INDEX.

	PAGE
Docket Entries in United States of America Action (A 126-101)	1
Docket Entries in Belgian Overseas Transports Action (A 126-167)	4
Libel	7
Answer of Claimant	11
Order Permitting Atlantic Mutual Insurance Company, et al., to Intervene	15
Petition of Intervention of Atlantic Mutual Insurance Company, et al.	17
Answer of Belgian Overseas Transports to Intervening Petition	23
Order Amending the Intervening Petition	27
Cross Libel of Belgian Overseas Transports	28
Order Amending Cross Libel	33
Order Further Amending Cross Libel	35
Answer to Cross Libel	36
Petition of United States of America to Implead Farr Sugar Corporation, et al.	40
Bill of Lading	52
Answer of Farr Sugar Corporation and American Spirits, Inc., Respondents Impleaded, to Petition of United States of America	68
Stipulation of Facts	71
Testimony	79
Opening Statement on Behalf of United States of America	80
Opening Statement on Behalf of Respondent Belgian Overseas Transports	82
Exhibits Offered in Evidence	86
Opinion of Medina, J.	101
Interlocutory Decree	113
Notice of Appeal	122
Proceedings in U. S. C. A. for the Second Circuit:	
Opinion, Clark, J.	135
Dissenting opinion, Hand, J.	148
Judgment	148
Clerk's certificate	149
Order allowing certiorari	151

PAGE

Assignment of Errors 125
Stipulation as to Exhibits 128
Stipulation as to Record 130
Clerk's Certificate 132

LIBELANT'S EXHIBITS:

1—Identical with Stipulation of Facts, printed herein at pages 71 to 78, marked in evidence at folio 257.

2—Record on the hearings before the Committee of Commerce of the Senate on Bill S-1152 (omitted pursuant to stipulation), marked in evidence at folio 261.

3—Report of Committee of Commerce of the Senate after hearings (omitted pursuant to stipulation), marked in evidence at folio 261.

4—Report of the hearings before the Committee on Merchant Marine and Fisheries of the House of Representatives (omitted pursuant to stipulation), marked in evidence at folio 262.

5—Report of the Committee of the Merchant Marine and Fisheries after hearings (omitted pursuant to stipulation), marked in evidence at folio 263.

6—Report of the delegates of the United States to the International Conference on Maritime Law (omitted pursuant to stipulation), marked in evidence at folio 264.

7—Senate Executive Report No. 2, approving the International Convention for the Unification of Rules relating to bills of lading (omitted pursuant to stipulation), marked in evidence at folio 265.

8—Portion of Congressional Record covering the date April 1, 1935, Proceedings in the Senate (omitted pursuant to stipulation), marked in evidence at folio 265.

9—Statement in tabular form from Mr. Knauth's book as to ratifications and adherences to the convention with respect to the Hague Rules and cargo liability (omitted pursuant to stipulation), marked in evidence at folio 267.

10—Portions of Mr. Benedict's work on American Admiralty (omitted pursuant to stipulation), marked in evidence at folio 267.

11—British Carriage By Seas Act in short form (omitted pursuant to stipulation), marked in evidence at folio 272.

12—Canadian Water Carriage Goods Act, 1936 (omitted pursuant to stipulation), marked in evidence at folio 272.

13—Page 319, et seq., of Bulletin No. 65 of the International Committee Gottenborg Conference (omitted pursuant to stipulation), marked in evidence at folio 273.

INTERVENORS' EXHIBITS:

A and B—Excerpts from the Hearings of the subcommittee on Foreign Relations of the United States Senate, 75th Congress, relating to the Collision Convention of 1910, hearings in 1938 (omitted pursuant to stipulation), marked in evidence at folio 276.

C—Excerpt from the Maritime Law Committee of the International Law Association, containing the text of the Hague Rules, 1922, as amended at the London Conference (omitted pursuant to stipulation), marked in evidence at folio 279.

D—Merchant Shipping Act of 1911 (omitted pursuant to stipulation), marked in evidence at folio 279.

E—Excerpt from the proceedings of the Maritime Law Committee at The Hague in 1921, pages 31 to 34 inclusive (omitted pursuant to stipulation), marked in evidence at folio 280.

F—Report of the 30th Conference, Internationl Law Association, Volume II (omitted pursuant to stipulation), marked in evidence at folio 282.

Docket Entries in United States of America Action (A 126-101).

UNITED STATES DISTRICT COURT,

Southern District of New York.

Title of Case	Attorneys
United States of America as owner of the S. S. "Nathaniel Bacon", and as bailee of her cargo,	United States Attorney
—against—	
Motor vessel "Esso Belgium", her engines, boilers, tackle, etc.	Kirlin Campbell Hickox Keating & McGrann 120 Broadway, New York, N. Y. Kirlin, Campbell, Hickox & Keating 120 Broadway, New York 5, N. Y. (Successor proctor)
Atlantic Mutual Insurance Company, et al. (4-6-43)	Bigham, Englar, Jones & Houston 99 John Street New York, N. Y.

1942			
Dec	2	Filed libel	
Dec	24	"	Stip. for costs ($250.— U. S. Guar. Co.)
Dec	24	"	Claim of Belgian Overseas Transports S. A. as owner of M/S "Esso Belgium" KCHK&M
Dec	24	"	Answer of Belgian Overseas Transports S. A. KCHK&M

Docket Entries in United States of America Action (A 126-101).

4

		1943	
Apr	6	Filed	Order permitting Atlantic Mutual Insurance Co., et al. to file intervening petition. Hulbert, *J.*, and intervening petition BEJ&H
Apr	8	"	Stipulation for intervening Petitioners' Costs ($250.— Ind. Ins. Co. of N. A.)
Apr	27	"	Answer of Belgian Overseas Transports S. A. to intervening petition KCHK&M
June	10	"	Letter from Dept. of Justice—Form "C"
Nov	23	"	Depositions of Otto Skaalon, et al.—M'l'd notices to procs. 11/24/43
		1944	
Apr	7	"	Order amending intervening petition to include Hanover Fire Insurance Co. as intervening petitioner. Caffey, *J.* BEJ&H
		1945	
Jan	10	"	Notice of Change of firm name from Kirlin, C. H. K. & McG. to Kirlin, Campbell, Hickox & Keating

5

6

		1947	
Feb	10	"	Stipulation
		1948.	
June	8	"	Consent & order restoring this case and A126-167 to foot of Admiralty Day Calendar. Goddard, *J.*
Dec	21	Trial	Begun with (A 126-167) Before Medina, *J.*
Dec	22	"	Cont'd

Docket Entries in United States of America Action (A 126-101).

1949		
Jan 11	Trial Cont'd	
Jan 12	" " & concluded. Decision Reserved	
1950		
May 9	Filed opinion #18,701. Medina, J.— (See opinion)	
June 14	" One volume of steno's minutes. (Also in A 126-167)	
Sept 11	" Interlocutory decree consolidating A 126-167 with this case and referring matter of damages to Richard T. O'Conpell as Commissioner. Medina, J. (Also in A 126-167)	
Sept 21	" Assignment of errors. (Also in A 126-167) BEJ&H.	
Sept 21	" Cost bond on appeal ($250.— Indem. Ins. Co. of N. A.) (Also A 126-167)	
Sept 21	" Notice of appeal and allowance. Ryan, J. (Also in A 126-1 Clerk's Fees: Defendant—5 (BEJ&H)	

Docket Entries in Belgian Overseas Transports Action (A 126-167).

UNITED STATES DISTRICT COURT,

Southern District of New York.

Title of Case	Attorneys
Belgian Overseas Transports, S. A., as owner of M/S "Esso Belgium", on its own behalf and also on behalf of War Shipping Administration,	Kirlin Campbell Hickox & Keating 120 Broadway, New York, N. Y
vs.	
United States of America, owner of the S. S. "Nathaniel Bacon",	United States Attorney
Farr Sugar Corporation, et al. (Impleaded 3-6-44)	Bigham, Englar, Jones & Houston 99 John Street New York, N. Y.

1942		
Dec 24	Filed Libel & Stip. for costs ($250.— U. S. 5— Guarantee Co.)	
Dec 28	"	Affidavit of service of copy of libel
1943		
June 25	"	Consent & order amending libel. KCHK&M
1944		
Feb 14	"	Order amending libel upon consent. Bondy, J.
Mar 6	"	Answer
Mar 6	"	Petition impleading Farr Sugar Corp. et al. U. S. Atty.
Aug 30	"	Stip. for costs. ($100.— Indem. Ins. Co. of N. Am.)

Docket Entries in Belgian Overseas Transports Action (A 126-167).

			13
1944			
Aug 30	Filed	Notice of Appearance of Farr Sugar Corp'n. BEJ&H	
Nov 24	"	Stip. for costs ($100.— Indem. Ins. Co. of N. Amer.)	
Nov 24	"	Answer of Farr Sugar Corp. and American Spirits, Inc. to impleading petition BEJ&H	
1945			
Jan 10	"	Notice of Change of Firm Name from Kirlin, C. H. K. & McG. to Kirlin, Campbell, Hickox & Keating	14
Jan 31	"	Letter from the Dept. of Justice—Form "C"—	
Sep 7	"	Stip. & order marking case off calendar. Knox, *J.*	
1947			
Feb 10	"	Stipulation	
1948			
June 8	"	Consent & order restoring this and A 126-101 to foot of adm. day calendar. Goddard, *J.* (Filed in A 126-101)	15
Dec 21	Trial	Begun (Tried with A 126-101) Before Medina, *J.*	
Dec 22	"	Cont'd	
1949			
Jan 11	"	"	
Jan 12	"	" and concluded, Decision Reserved	
1950			
May 9	Filed	opinion #18,701. Medina, *J.* (See opinion filed in A 126-101)	

Docket Entries in Belgian Overseas Transports Action (A 126-167).

16

1950

June 14	Filed	One volume of steno's minutes. (Filed in A 126-101)
Sept 11	"	Interlocutory decree consolidating this case with A 126-101 and referring matter of damages to R. T. O'Connell as Comm'r. Medina, *J.* (Filed in A 126-101)
Sept 21	"	Assignment of error. (Filed in A 126-101) BEJ&H
Sept 21	"	Cost bond on appeal ($250.— Indem. Ins. Co. of N. A.) (Filed in A 126-101)
Sept 21	"	Notice of appeal and allowance. Ryan, *J.* (Filed in A 126-101);

17

18

Libel.

19

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The libel of the United States of America, as owner of the steamship "Nathaniel Bacon", and as bailee of her cargo, against the motor vessel "Esso Belgium", her engines, boilers, tackle, etc., in a cause of collision civil and maritime, alleges upon information and belief and respectfully shows to this Honorable Court as follows:

First: At all the times hereinafter mentioned the libellant was, and now is, a corporation soverign and 20
owner of the S/S "Nathaniel Bacon", which vessel up to the time of the collision hereinafter mentioned was tight, staunch, strong and in all respects seaworthy.

Second: The M/V "Esso Belgium" is now, or during the pendency of process herein, will be within this district and within the jurisdiction of this Honorable Court.

Third: On the morning of November 24, 1942, in Upper New York Bay, to the eastward of the northerly end of Staten Island, the M/V "Esso Belgium" struck and collided with the S/S "Nathaniel Bacon", extensively 21
damaging the latter vessel and her cargo.

Fourth: The circumstances of the aforesaid collision were as follows: The "Nathaniel Bacon", loaded with a general cargo, lay anchored to the eastward of Tompkinsville, Staten Island. At about 7:05 A. M. she heaved anchor and with proper navigation lights burning, got under way, bound for Pier 35, North River. With her engines running at various speeds she proceeded very slowly and steadied on a course headed for Owl's Head Buoy No. 24. Daylight had not yet broken and a light

22 rain was falling. The "Esso Belgium" was observed on the "Nathaniel Bacon's" port bow showing her green light. The "Nathaniel Bacon" sounded a one-blast whistle signal and the "Esso Belgium" answered with one blast. The "Nathaniel Bacon" continued ahead and permitted a United States Army dredge, which was approaching, to cross from the "Nathaniel Bacon's" port to starboard bow and the "Bacon" passed under the stern of the dredge. Meanwhile, the "Esso Belgium", without reducing her speed or checking her headway, approached close aboard the port side of the "Nathaniel Bacon". The "Esso Bel-
23 gium" was heard to sound a three-whistle backing signal and the alarm and to let go her starboard anchor, but she continued on with headway unabated and her bow came into violent collision with the port side of the "Nathaniel Bacon" in the way of No. 3 cargo hold and forward of the bridge.

Fifth: As a result of the foregoing, a large gaping hole was cut in the port side of the "Nathaniel Bacon" and she made so much water in her holds that it became necessary for the safety of her cargo and the safety of the vessel to run her aground in the shallow water
24 of Red Hook Flats.

Sixth: Before the "Nathaniel Bacon" could be floated it became necessary to lighten her and to lighter off a large portion of her fuel and cargo.

Seventh: The aforesaid collision and damage were not caused or contributed to by any fault or neglect on the part of the libellant or of the officers and crew of the S/S "Nathaniel Bacon" but were caused solely by the fault and neglect of the M/V "Esso Belgium" and those aboard and in charge of her in the following, among

other, particulars which will be pointed out at the trial of this action:

1. In that those in charge of the M/V "Esso Belgium" were careless, incompetent and inattentive to their duties.

2. In that the M/V "Esso Belgium was improperly manned and equipped.

3. In failing to have a lookout properly stationed and attending to his duties.

4. In failing to navigate to pass the "Nathaniel Bacon" as the situation required.

5. In failing to direct her course to her own starboard.

6. In failing to pass under the stern of the "Nathaniel Bacon".

7. In failing to stop and reverse in time to avoid collision.

8. In failing to make due allowance for wind and tide and to take into consideration the existing circumstances.

9. In failing to navigate in compliance with the one-whistle signal exchange with the "Nathaniel Bacon".

10. In failing to keep out of the way of a privileged vessel.

11. In proceeding at an immoderate, improper and excessive speed.

12. In failing to sound proper whistle signals.

13. In failing to take any or any proper steps to avoid collision.

Libel.

Eighth: By reason of the matters aforesaid libellant and those on behalf of whom this libel is filed sustained damages which, although not yet fully ascertainable, are estimated in the sum of approximately $200,000, no part of which has been paid although duly demanded.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libellant prays that process in due form of law may issue against the M/V "Esso Belgium", her engines, boilers, tackle, etc.; that all persons having or claiming to have any interest therein may be cited to appear and answer all and singular the matters aforesaid; that libellant may have a decree for the amount of its claim, with interest and costs; that said M/V "Esso Belgium", her engines, boilers, tackle, etc., may be condemned and sold to pay the same, and that libellant may have such other and further relief as may be just.

MATHIAS F. CORREA,
United States Attorney,
Proctor for Libellant,
Office and P. O. Address,
Room 404, 45 Broadway,
Borough of Manhattan,
City of New York.

(Verified by William E. Collins, December 1, 1942.)

Answer of Claimant.

31

To the Honorable the Judges of the United States District Court for the Southern District of New York

The answer of Belgian Overseas Transports S. A., claimant of M/S "Esso Belgium", to the libel of the United States of America, as owner of the steamship "Nathaniel Bacon", and as bailee of her cargo, in a cause of collision, civil and maritime, alleges upon information and belief as follows:

First: Admits that at all the times mentioned in the libel the libelant was and now is a corporation sovereign and owner of the SS "Nathaniel Bacon". Denies that it has any knowledge or information sufficient to form a belief as to each and all of the other matters alleged in the First article of the libel. 32

Second: Admits the matters alleged in the Second article of the libel.

Third: Admits that on the morning of November 24, 1942 the M/S "Esso Belgium" was in collision with the SS "Nathaniel Bacon" in Upper New York Bay, to the eastward of the northerly end of Staten Island. Denies that it has any knowledge or information sufficient to form a belief as to each and all of the other matters alleged in the Third article of the libel. 33

Fourth: Admits that the "Esso Belgium" sounded a three whistle backing signal and let go her starboard anchor. Denies that the "Nathaniel Bacon" proceeded very slowly; that the "Esso Belgium" answered with one blast; that the "Esso Belgium" approached the port side of the "Nathaniel Bacon"; that the "Esso Belgium" failed to reduce speed or check her headway and continued with her headway unabated. Denies that it has any knowledge or information sufficient to form a belief as to each and all

34 of the other matters alleged in the Fourth article of the libel.

Fifth: Denies each and all of the matters alleged in the Fifth article of the libel.

Sixth: Denies that it has any knowledge or information sufficient to form a belief as to each and all of the matters alleged in the Sixth article of the libel.

Seventh: Denies each and all of the matters alleged in the Seventh article of the libel, including subdivisions one to thirteenth inclusive.

35 Eighth: Admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court. Denies each and all of the other matters alleged in the Eighth article of the libel.

Ninth: Further answering, claimant alleges that on the morning of November 24, 1942, M/S "Esso Belgium", a twin screw motor tanker, hereinafter called the "Belgium", sailed from Pier 5, Bayonne, New Jersey in compliance with United States Naval orders. She was tight, staunch, strong and in all respects seaworthy. It was raining but the visibility was good. The wind was southeast, force
36 about 4, and the tide flood. The navigation was in charge of a duly licensed pilot, and with him on the bridge were the captain, the third officer and a qualified helmsman. On the forecastle head were the chief officer, the boatswain and a qualified lookout. The "Belgium" proceeded without incident down the Kill Van Kull and approached the Stapleton anchorage at slow speed. In the anchorage there were many vessels at anchor, stemming the flood tide and heading downstream. The area occupied by the anchored vessels extended into the main ship channel. No navigational lights of any vessels underway were observed within said area. The "Belgium" proceeded slowly, making to pass between an anchored tanker which was

lying in the main ship channel about 500 yards in a general northwesterly direction from Red Buoy No. 22, and a dredge which was working a short distance to the east of said anchored tanker. The engines of the "Belgium" were stopped as the "Belgium" approached the opening between the anchored tanker and the dredge. When the "Belgium" was near the stern of the anchored tanker, suddenly a red light and a white masthead light of a vessel underway were seen off the starboard bow, to the right of the anchored tanker, only a short distance away, and at the same moment said vessel, which proved to be the "Nathaniel Bacon", sounded a one whistle signal. The "Nathaniel Bacon" was heading out of the crowded anchorage at considerable speed, and without due precaution, on a course directly across the bows of the anchored tanker and of the "Belgium". On sighting the navigational lights of the "Nathaniel Bacon" as aforesaid, both engines of the "Belgium" were immediately put full speed astern, a three blast signal was sounded on the whistle, the starboard anchor was dropped, and the danger signal immediately sounded. The "Belgium", which had been proceeding slowly, quickly lost her headway, but the "Nathaniel Bacon" continued without reducing her speed across the bow of the anchored tanker and then across the bow of the "Belgium". The port side of the "Nathaniel Bacon", in the vicinity of the bridge, struck and seriously damaged the bow of the "Belgium" as she passed across. The "Nathaniel Bacon" continued with unabated speed and disappeared in the direction of Bay Ridge Flats. The collision occurred at about 7:20 A. M. The "Belgium" remained at anchor until about 7:55 A. M. when she moved out of the fairway to another anchorage, and thereafter returned to pier at Bayonne for examination. 37 38 39

Tenth: Said collision and the damages resulting therefrom were not caused or contributed to by any fault on the part of the claimant herein, or of the "Belgium", or

those in charge of her, or of anyone for whose acts or omissions claimant was responsible, but were wholly caused by fault and negligence on the part of the "Nathaniel Bacon", and those in charge of her, in the following respects, among others:

1. In that those in charge of her were careless and inattentive to their duties.

2. In that she failed to keep a proper lookout.

3. In that she proceeded out of the anchorage and across the main channel without regard to the presence of vessels underway in the main channel.

4. In that she navigated through and beyond the anchorage without regard to the special circumstances of the case.

5. In that she proceeded at an immoderate and excessive rate of speed.

6. In that she failed to take due precaution to avoid collision.

Eleventh: All and singular the premises are true.

WHEREFORE, claimant prays the libel herein may be dismissed with costs.

KIRLIN CAMPBELL HICKOX KEATING
& MCGRANN,
Proctors for Claimant, Belgian
Overseas Transports S. A.,
Office & P. O. Address,
120 Broadway,
Borough of Manhattan,
City of New York.

(Verified by Edwin S. Murphy, as Attorney, on April 23, 1942.)

Order Permitting Atlantic Mutual Insurance Company, et al., to Intervene.

43

(A 126-101)

At a Stated Term of the United States District Court held in and for the Southern District of New York at the Courtrooms thereof in the United States Court House, Foley Square, Borough of Manhattan, City, County and State of New York, on the 6th day of April, 1943.

Present—Honorable George Murray Hulbert,
District Judge.

United States of America, as owner of the Steamship "Nathaniel Bacon", and as Bailee of her cargo, 44
Libellant,

—against—

Motorvessel "Esso Belgium", her engines, boilers, tackle, etc.,

Belgian Overseas Transport, S. A.,
Claimant.

Atlantic Mutual Insurance Company, Federal Insurance Company, Home Insurance Company, Fidelity Phenix 45
Fire Insurance Company, Firemen's Insurance Company, Glens Falls Insurance Company, Standard Marine Insurance Company, Ltd., St. Paul Fire & Marine Insurance Company, Queen Insurance Company of America, Star Insurance Company of America, Insurance Company of North America, Fireman's Fund Insurance Company, United States Fire Insurance Company, Agricultural Insurance Company, Commercial Union Assurance Company, Ltd. and Westchester Fire Insurance Company, insurers of cargo laden on the Steamship "Nathaniel Bacon" having presented the annexed petition for leave to intervene for their own interests and those of their

46 assureds in the above entitled action, it is upon the subjoined consent and on motion of Bigham, Englar, Jones & Houston, proctors for petitioners,

ORDERED that Atlantic Mutual Insurance Company, Federal Insurance Company, Home Insurance Company, Fidelity Phenix Insurance Company, Firemen's Insurance Company, Glens Falls Insurance Company, Standard Marine Insurance Company, Ltd., St. Paul Fire & Marine Insurance Company, Queen Insurance Company of America, Star Insurance Company of America, Insur-
47 ance Company of North America, Fireman's Fund Insurance Company, United States Fire Insurance Company, Agricultural Insurance Company, Commercial Union Assurance Company, Ltd. and Westchester Fire Insurance Company have leave to intervene and file their intervening petition herein as prayed for, and that the original petition for intervention annexed hereto be filed in this action; and it is further

ORDERED that the claimant Belgian Overseas Transport, S. A., answer the allegations of the intervening petition or, in the event of their default or failure to answer herein, that a decree be entered against them for the
48 relief demanded in the petition.

HULBERT,
U. S. D. J.

We hereby consent to the entry of the foregoing order.

MATHIAS F. CORREA,
Proctor for Libellant.

By VINCENT A. CATOGGIO,
Special Asst. U. S. Atty.

KIRLIN CAMPBELL HICKOX KEATING & MCGRANN,
Proctors for Claimant.

Petition of Intervention of Atlantic Mutual Insurance Company, et al.

To the Honorable the Judges of the United States District Court for the Southern District of New York.

The Petition of Atlantic Mutual Insurance Company, Federal Insurance Company, Home Insurance Company, Fidelity Phenix Fire Insurance Company, Firemen's Insurance Company, Glens Falls Insurance Company, Standard Marine Insurance Company, Ltd., St. Paul Fire & Marine Insurance Company, Queen Insurance Company of America, Star Insurance Company of America, Insurance Company of North America, Fireman's Fund Insurance Company, United States Fire Insurance Company, Agricultural Insurance Company, Commercial Union Assurance Company, Ltd. and Westchester Fire Insurance Company, Insurers of cargo laden on the steamship "Nathaniel Bacon", intervening for their own interests and those of their assureds in the suit of United States of America, as owner of the steamship "Nathaniel Bacon", and as Bailee of her cargo, against the Motorvessel "Esso Belgium", her engines, boilers, tackle, etc., in a cause of collision, civil and maritime, alleges upon information and belief as follows:

First: Your petitioners are corporations organized and existing under and by virtue of the laws of several states of the United States or of foreign countries with offices, agents or places of business in the City of New York.

Second: On November 24, 1942, your petitioners were the insurers and their assureds were the owners and/or shippers and/or consignees of shipments of cargo which had been duly laden on the steamship "Nathaniel Bacon", on a voyage from Puerto Rico to New York City.

52

Third: Upon information and belief, the M/V "Esso Belgium" is a twin screw motor tank vessel, 480.2′ in length, 74.9′ in breadth, and 37.2′ in depth, of 10,568 gross and 5,557 net registered tonnage and was owned and operated by Belgian Overseas Transports, S. A.

Fourth: On information and belief, on the morning of November 24, 1942, the steamship "Nathaniel Bacon" laden with general cargo, including the cargo in which your libellants and their assureds are interested, lay anchored to the eastward of Tompkinsville, Staten Island.
53 Shortly after 7 A. M., she heaved anchor and with proper navigation lights burning, got under way bound for Pier 35, North River. With her engines running at various speeds, she proceeded slowly and steadied on a course headed for Owls Head Buoy #24. Daylight had not yet broken and a light rain was falling. The "Esso Belgium" was observed on the "Nathaniel Bacon's" port bow, showing her green side light. The "Nathaniel Bacon" sounded a one blast signal and the "Esso Belgium" answered with one blast. The "Nathaniel Bacon" continued ahead and permitted a United States army dredge, which was approaching, to cross from the "Nathaniel Bacon's" port
54 to starboard bow and the "Nathaniel Bacon" passed astern of the dredge. In the meantime, the M/V "Esso Belgium", without reducing her speed or checking her headway or altering her course substantially, approached close on the port side of the "Nathaniel Bacon". The "Esso Belgium" was heard to sound a three blast backing signal and alarm signal and was observed to drop her starboard anchor. The "Esso Belgium", nevertheless, continued with headway scarcely reduced and her bow came into violent collision with the port side of the "Nathaniel Bacon" in the way of #3 cargo hold forward of the bridge. As a result of the foregoing collision, a large hole was torn in the port side of the "Nathaniel Bacon" through

55

which much water entered her holds and damaged cargo, including the cargo in which your petitioners are interested. Some of the cargo was also damaged by the impact of the collision. As a result of the damage sustained by the vessel, it became necessary for those in charge of the "Nathaniel Bacon" to run her aground in the shallow water of Red Hook Flats to avoid sinking of the vessel in deep water. Thereafter, in order to float the vessel, a large portion of her fuel and cargo were removed from the vessel by lighters.

56

Fourth: The aforesaid collision and consequent damage to the cargo in which your petitioners and their assureds are interested were not caused or contributed to by any fault or neglect on the part of your petitioners or any person for whom your petitioners or their assureds are responsible, but were caused solely by fault and neglect on the part of the M/V "Esso Belgium" and those in charge of her, in the following, among other respects, which will be pointed out at the trial of this action.

57

1. In that those in charge of the M/V "Esso Belgium" were careless, incompetent and inattentive to their duties.
2. In that the M/V "Esso Belgium" was improperly manned and equipped.
3. In failing to have a lookout properly stationed and attentive to his duties.
4. In failing to navigate to pass the "Nathaniel Bacon" as the situation required.
5. In failing to direct her course to her own starboard.
6. In failing to pass under the stern of the "Nathaniel Bacon".

58

7. In failing to stop and reverse her engines in time to avoid collision.

8. In failing to make due allowance for wind and tide and to take into consideration existing circumstances.

9. In failing to navigate in compliance with the one whistle signal blown by the "Esso Belgium" and answered by the "Nathaniel Bacon".

10. In failing to keep out of the way of the privileged
59 vessel.

11. In proceeding at immoderate, improper and excessive speed.

12. In failing to sound proper whistle signals.

13. In failing to take any or proper steps to avoid collision.

Fifth: By reason of the premises, and as a result of the said collision, there were sacrifices of the vessel and cargo made, and expenses of a general average nature incurred, for the safety of the vessel and cargo, and for
60 the purpose of minimizing the losses resulting from the collision. Upon arrival of the cargo in which your petitioners and their assureds were interested at destination, your petitioners and their assureds were called upon to give and did give general average bonds and guarantees for payment of the respective proportions of general average expenses and sacrifices properly due with respect to the shipments in which they were interested. A general average statement is in the course of preparation and in due course your petitioners or their assureds will be required to pay such proportions of the general average expenses and sacrifices.

61

Sixth: By reason of the premises, your petitioners and their assureds have sustained damage both by reason of physical injury to the shipments in which they were interested resulting from the collision, and by reason of contributions in general average to general average expenses and sacrifices of the vessel and cargo properly due from them and consequent on the collision. Your petitioners, as insurers of the aforesaid cargo, have made or will make payments to their assureds, as owners of the said cargo for damage sustained thereby resulting from the collision, and will be required to pay for the account of the assureds all or part of the proportions of 62
general average due with respect to insured cargo. By reason of such payments your petitioners have become, or will become, subrogated to the extent of such payments to the rights of the owners of such insured cargo against the M/V "Esso Belgium" or owners or other persons responsible for said loss and damage.

Seventh: By reason of the matters aforesaid, your petitioners and/or their assureds have been damaged in the sum of $200,000, as nearly as the same can now be estimated, no part of which has been paid, although pay- 63
ment thereof has been duly demanded.

Eighth: On or about December 1, 1942, a libel was filed by the United States of America, as owner of the S. S. "Nathaniel Bacon", and as bailee of the cargo laden on board, against the M/V "Esso Belgium", her engines, boilers, etc. to recover damages, including the damages of your petitioners and their assureds as hereinafter set forth.

Ninth: This petition is filed by your petitioners for their own interest, and as agents and trustees for their

64 respective assureds, and on behalf of and for the interest of all parties who may be, or may become, interested in the shipments herein referred to as their respective interests may ultimately appear.

WHEREFORE, your petitioners pray that they be allowed to intervene in this proceeding for their own interests and for the interests represented by them, and that the claimant of the M/V "Esso Belgium" be required to answer this petition, and that this Honorable Court will decree to your petitioners against the M/V "Esso Bel-
65 gium" their damages and the damages of those represented by them and that this court will grant such other and further relief to your petitioners as to the court may seem just and proper.

BIGHAM, ENGLAR, JONES & HOUSTON,
Proctors for Petitioners,
Office & P. O. Address,
No. 99 John Street,
New York, N. Y.

66 (Verified by Lee Orton, as Assistant Treasurer of Federal Insurance Company, on April 1, 1943.)

Answer of Belgian Overseas Transports to Intervening Petition.

67

To the Honorable the Judges of the United States District Court for the Southern District of New York

The answer of Belgian Overseas Transports S. A., as claimant of M/S "Esso Belgium" and as respondent, to the intervening petition filed by Atlantic Mutual Insurance Company and others and also on behalf of any others interested in said vessel, her use and operation, in a cause of collision, civil and maritime, alleges, upon information and belief, as follows:

68

First: Denies that it has any knowledge or information sufficient to form a belief as to each and all of the matters alleged in the First Article of the petition.

Second: Denies that it has any knowledge or information sufficient to form a belief as to each and all of the matters alleged in the Second Article of the petition.

Third: Admits the matters alleged in the Third Article of the petition.

Fourth: Admits that the "Esso Belgium" sounded a 69
three-whistle backing signal and let go her starboard anchor, and did not alter her course substantially. Denies that the "Nathaniel Bacon" proceeded slowly; that the "Esso Belgium" answered with one blast; that the "Esso Belgium" approached the port side of the "Nathaniel Bacon"; that the "Esso Belgium" failed to reduce her speed or to check her headway; that she continued with her headway scarcely reduced, and that the bow of the "Esso Belgium" came into violent collision with the port side of the "Nathaniel Bacon" in the way of No. 3 cargo hold forward of the bridge. Denies each and all of the matters alleged in that subsequent Article of the

70 petition also designated "Fourth", including subdivisions one to thirteenth, inclusive. Denies that it has any knowledge or information sufficient to form a belief to each and all of the other matters alleged in the Fourth Article or Articles of the petition.

Fifth: Denies each and all of the matters alleged in the Fifth Article of the petition.

Sixth: Denies each and all of the matters alleged in the Sixth Article of the petition.

71 Seventh: Denies each and all of the matters alleged in the Seventh Article of the petition.

Eighth: Denies that it has any knowledge or information sufficient to form a belief as to each and all of the matters alleged in the Eighth Article of the petition.

Ninth: Denies that it has any knowledge or information sufficient to form a belief as to each and all of the matters alleged in the Ninth Article of the petition.

72 Tenth: Further answering, claimant-respondent, alleges that on the morning of November 24, 1942, the M/S "Esso Belgium", a twin screw motor tanker, hereinafter called the "Belgium", sailed from Pier 5, Bayonne, New Jersey, in compliance with United States Naval orders. She was tight, staunch, strong and in all respects seaworthy. It was raining but the visibility was good. The wind was southeast, force about 4, and the tide flood. The navigation was in charge of a duly licensed pilot, and with him on the bridge were the captain, the third officer and a qualified helmsman. On the forecastle head were the chief officer, the boatswain and a qualified lookout. The "Belgium" proceeded without incident down the Kill

73

Van Kull and approached the Stapleton anchorage at slow speed. In the anchorage there were many vessels at anchor, stemming the flood tide and heading downstream. The area occupied by the anchored vessels extended into the main ship channel. No navigational lights of any vessels under way were observed within said area. The "Belgium" proceeded slowly, making to pass between an anchored tanker which was lying in the main ship channel about 500 yards in a general northwesterly direction from Red Buoy No. 22, and a dredge which was working a short distance to the east of said anchored tanker. The engines of the "Belgium" were 74 stopped as the "Belgium" approached the opening between the anchored tanker and the dredge. When the "Belgium" was near the stern of the anchored tanker, suddenly a red light and a white masthead light of a vessel under way were seen off the starboard bow, to the right of the anchored tanker, only a short distance away, and at the same moment said vessel, which proved to be the "Nathaniel Bacon", sounded a one whistle signal. The "Nathaniel Bacon" was heading out of the crowded anchorage at considerable speed, and without due precaution, on a course directly across the bows of the 75 anchored tanker and of the "Belgium". On sighting the navigational lights of the "Nathaniel Bacon" as aforesaid, both engines of the "Belgium" were immediately put full speed astern, a three blast signal was sounded on the whistle, the starboard anchor was dropped, and the danger signal immediately sounded. The "Belgium", which had been proceeding slowly, quickly lost her headway, but the "Nathaniel Bacon" continued without reducing her speed across the bow of the anchored tanker and then across the bow of the "Belgium". The port side of the "Nathaniel Bacon", in the vicinity of the bridge, struck and seriously damaged the bow of the "Belgium"

76 as she passed across. The "Nathaniel Bacon" continued with unabated speed and disappeared in the direction of Bay Ridge Flats. The collision occurred at about 7:20 A. M. The "Belgium" remained at anchor until about 7:55 A. M. when she moved out of the fairway to another anchorage, and thereafter returned to the pier at Bayonne for examination.

Eleventh: Said collision and the damages resulting therefrom were not caused or contributed to by any fault on the part of the claimant-respondent herein, or of the 77 "Belgium", or those in charge of her, or of anyone for whose acts or omissions claimant-respondent was responsible, but were wholly caused by fault and negligence on the part of the "Nathaniel Bacon", and those in charge of her, in the following respects, among others:

1. In that those in charge of her were careless and inattentive to their duties.

2. In that she failed to keep a proper lookout.

3. In that she proceeded out of the anchorage and across the main channel without regard to the 78 presence of vessels under way in the main channel.

4. In that she navigated through and beyond the anchorage without regard to the special circumstances of the case.

5. In that she proceeded at an immoderate and excessive rate of speed.

6. In that she failed to take due precaution to avoid collision.

Twelfth: All and singular the premises are true.

Answer of Belgian Overseas Transports to Intervening Petition.

79

WHEREFORE, claimant-respondent prays that the intervening petition herein may be dismissed with costs.

KIRLIN CAMPBELL HICKOX KEATING
& MCGRANN,
Proctors for Claimant-Respondent,
Office and P. O. Address,
120 Broadway,
New York, N. Y.

(Verified by Edwin S. Murphy, as Attorney on April 27, 1943.)

80

Order Amending the Intervening Petition.

At a Stated Term of the United States District Court held in and for the Southern District of New York at the Courtrooms thereof in the United States Court House, Foley Square, Borough of Manhattan, City, County and State of New York, on the 7th day of April, 1944.

Present—HONORABLE FRANCIS G. CAFFEY, *District Judge.*

81

[SAME TITLE.]

Upon the annexed consents and on motion of Bigham, Englar, Jones & Houston, proctors for intervening petitioners, it is

ORDERED that the intervening petition of Atlantic Mutual Insurance Company, et al., filed herein on or about April 6, 1943 be and the same is hereby amended to name and include Hanover Fire Insurance Company as intervening

Order Amending the Intervening Petition.

82 petitioner with the same force and effect as though originally named and included as intervening petitioner therein.

FRANCIS G. CAFFEY,
U. S. D. J.

We hereby consent to the entry of the foregoing order.

JAMES B. M. MCNALLY,
U. S. Attorney,
By VINCENT A. CATOGGIO, JR.,
Sp. Ass't,
83 Proctor for Libellant.

KIRLIN, CAMPBELL, HICKOX, KEATING & MCGRANN,
By E. A. MURPHY,
Proctors for Claimant
Belgium Overseas Transport, S. A.

Cross Libel of Belgian Overseas Transports.

84 *To the Honorable the Judges of the United States District Court for the Southern District of New York*

The cross-libel of Belgian Overseas Transports, S. A., as owner of M/S "Esso Belgium", on its own behalf and also on behalf of War Shipping Administration, against United States of America, owner of the SS "Nathaniel Bacon", in a cause of collision, civil and maritime, alleges on information and belief as follows:

First: At the times hereinafter mentioned cross-libelant, Belgian Overseas Transports S. A. was and now is a corporation duly organized and existing under the

laws of Belgium and was and is the sole owner of M/S 85
"Esso Belgium", hereinafter called the "Belgium", which is a twin screw motor tank vessel, 488.2 feet in length, 74.9 feet in breadth and 37.2 feet in depth, of 10,568 gross and 5,557 net registered tonnage and was, until the collision hereinafter set forth, tight, staunch, strong and in all respects seaworthy.

Second: At all the times hereinafter mentioned the United States of America was and is the sole owner of SS "Nathaniel Bacon", a merchant vessel, and that it operated, controlled and manned said vessel.

86

Third: SS "Nathaniel Bacon" is now within the jurisdiction of this Court.

Fourth: This cross-libel is filed pursuant to the provisions of the Suits in Admiralty Act, 1920. Cross-libelant elects that this suit may proceed in accordance with the principles of libels *in rem*.

Fifth: On the morning of November 24, 1942, the "Belgium" sailed from Pier 5, Bayonne, New Jersey in compliance with United States Naval orders. She was tight, staunch, strong and in all respects seaworthy. It 87
was raining but the visibility was good. The wind was southeast, force about 4, and the tide flood. The navigation was in charge of a duly licensed pilot, and with him on the bridge were the captain, the third officer and a qualified helmsman. On the forecastle head were the chief officer, the boatswain and a qualified lookout. The "Belgium" proceeded without incident down the Kill Van Kull and approached the Stapleton anchorage at slow speed. In the anchorage there were many vessels at anchor, stemming the flood tide and heading downstream. The area occupied by the anchored vessels

88 extended into the main ship channel. No navigational lights of any vessels underway were observed within said area. The "Belgium" proceeded slowly, making to pass between an anchored tanker which was lying in the main ship channel about 500 yards in a general northwesterly direction from Red Buoy No. 22, and a dredge which was working a short distance to the east of said anchored tanker. The engines of the "Belgium" were stopped as the "Belgium" approached the opening between the anchored tanker and the dredge. When the "Belgium" was near the stern of the anchored tanker, suddenly a red light and a white masthead light of a
89 vessel underway were seen off the starboard bow, to the right of the anchored tanker, only a short distance away, and at the same moment said vessel, which proved to be the "Nathaniel Bacon", sounded a one whistle signal. The "Nathaniel Bacon" was heading out of the crowded anchorage at considerable speed, and without due precaution, on a course directly across the bows of the anchored tanker and of the "Belgium". On sighting the navigational lights of the "Nathaniel Bacon" as aforesaid, both engines of the "Belgium" were immediately put full speed astern, a three blast signal was sounded
90 on the whistle, the starboard anchor was dropped, and the danger signal immediately sounded. The "Belgium", which had been proceeding slowly, quickly lost her headway, but the "Nathaniel Bacon" continued without reducing her speed across the bow of the anchored tanker and then across the bow of the "Belgium". The port side of the "Nathaniel Bacon", in the vicinity of the bridge, struck and seriously damaged the bow of the "Belgium" as she passed across. The "Nathaniel Bacon" continued with unabated speed and disappeared in the direction of Bay Ridge Flats. The collision occurred at about 7:20 A. M. The "Belgium" remained at anchor until about 7:55 A. M. when she moved out of the fair-

way to another anchorage, and thereafter returned to pier at Bayonne for examination. 91

Sixth: Said collision and the damages resulting therefrom were not caused or contribnted to by any fault on the part of the cross-libelant herein, or of the "Belgium", or those in charge of her, or of anyone for whose acts or omissions cross-libelant was responsible, but were wholly caused by fault and negligence on the part of the "Nathaniel Bacon", and those in charge of her, in the following respects, among others:

1. In that those in charge of her were careless and inattentive to their duties. 92

2. In that she failed to keep a proper lookout.

3. In that she proceeded out of the anchorage and across the main channel without regard to the presence of vessels underway in the main channel.

4. In that she navigated through and beyond the anchorage without regard to the special circumstances of the case.

5. In that she proceeded at an immoderate and excessive rate of speed. 93

6. In that she failed to take due precaution to avoid collision.

Seventh: By reason of the premises, cross-libelant has sustained damages which amount to about the sum of Ten Thousand ($10,000.00) Dollars, as nearly as can now be estimated, consisting of cost of repairs and other incidental expenses incurred by reason of the collision, no part of which has been paid although duly demanded.

Eighth: At all times hereinbefore mentioned the "Belgium" was under time charter to War Shipping Adminis-

94 tration. Pursuant to the terms of said charter, War Shipping Administration has paid or is obliged to pay charter hire to cross-libelant for the use of the "Belgium". As a result of the matters above set forth, War Shipping Administration has lost the use of said vessel during the period of detention necessitated by the repair of damages due to said collision, all to its damage in the amount of Twelve Thousand ($12,000.00) Dollars. Cross-libelant is authorized and required by War Shipping Administration to make claim for said detention damages on behalf of War Shipping Administration and to bring
95 suit therefor on its behalf.

Ninth: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, cross-libelant prays that process in due form of law, according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the United States of America and that it may be cited to appear and answer upon oath all and singular the matters aforesaid, and that this Honorable Court may be pleased to decree to
96 cross-libelant payment of damages as aforesaid, with interest and costs, and that cross-libelant may have such other and further relief as may be just.

KIRLIN CAMPBELL HICKOX KEATING
& MCGRANN,
Proctors for Cross-libelant,
Office & P. O. Address,
120 Broadway,
Borough of Manhattan,
City of New York.

(Verified by Edwin S. Murphy, as Attorney, on April 23, 1942.)

Order Amending Cross Libel.

97

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

A126-167

BELGIAN OVERSEAS TRANSPORTS S. A., as owner of M/S "Esso Belgium",

Cross Libellant,

—against—

UNITED STATES OF AMERICA, as owner of S. S. "Nathaniel Bacon", 98

Cross Respondent.

WHEREAS United States of America, respondent, through the United States Attorney for the Southern District of New York, Admiralty Division, has requested that the cross libel herein be amended to eliminate any claim on behalf of War Shipping Administration or the United States of America for loss of use by detention during repairs of M. S. "Esso Belgium", and

99

WHEREAS cross libellant herein wishes to amend its allegations of damages sustained by reasons of the matters stated in the cross libel in order to set forth a claim of approximately $20,000 so nearly as can now be ascertained:

Now on motion of Kirlin, Campbell, Hickox, Keating & McGrann, proctors for cross libellant, and on the subjoined consent, it is

Order Amending Cross Libel.

100 ORDERED that the caption of the cross libel herein be and it is amended to read as follows:

> "The cross libel of Belgium Overseas Transports S. A., as owners of the M. S. 'Esso Belgium' against the United States of America as owners of S. S. 'Nathaniel Bacon', in a cause of collision, civil and maritime, alleges on information and belief as follows:"

and it is further,

101 ORDERED that Article Seventh of said cross libel be and hereby is amended to read as follows:

> "Seventh: By reason of the premises, cross-libellant has sustained damages which amount to about the sum of $20,000, so nearly as can now be ascertained, consisting of cost of repairs, loss of use of M. S. 'Esso Belgium' by detention during repairs, and other incidental expenses incurred by reason of the collision, no part of which has been paid although duly demanded."

and it is further,

102 ORDERED that Article Eighth of said cross libel be and it hereby is struck out, and the number of Article Ninth of said libel be changed to "Eighth".

S. J. RIFKIND,
U. S. D. J.

Dated: June 25, 1943.

Order Further Amending Cross Libel.

[SAME TITLE.]

WHEREAS Atlantic Mutual Insurance Company, et al., insurers of cargo laden of the Steamship "Nathaniel Bacon", intervening for their own interests and those of their assureds, have filed an intervening petition in an action in this Court entitled "United States of America as owners of the Steamship 'Nathaniel Bacon' and as bailee of her cargo, libelant, against Motor Vessel 'Esso Belgium', her engines, boilers, tackle, etc. Belgium Overseas Transport S. A., claimant", Docket No. A 126-101, and

WHEREAS an order having been entered herein on June 25, 1943 amending Article Seventh of the cross-libel, and

WHEREAS, the United States of America has not yet filed an answer to the cross-libel herein,

Now on motion of Kirlin, Campbell, Hickox, Keating & McGrann, proctors for cross-libellant, and on the subjoined consent, it is

ORDERED that Article Seventh of the said cross libel be and hereby is further amended to read as follows:

"Seventh: By reason of the premises, cross libelant has sustained damages which amount to about the sum of $20,000, so nearly as can now be ascertained, consisting of cost of repairs, loss of use of M. S. 'Esso Belgium' by detention during repairs, and other incidental expenses incurred by reason of the collision, no part of which has been paid although duly demanded: and in addition thereto, cross-libelant, denying any and all liability

Order Further Amending Cross Libel.

106 —therefor, claims against the United States of America, the amount, if any, which cross libelant or M. S. 'Esso Belgium' may be held liable to pay to any person or corporation with respect to damages alleged to have been sustained in consequence of, or in connection with, said collision, by any cargo on board S. S. 'Nathaniel Bacon'."

W. BONDY,
U. S. D. J.

Dated: February 14, 1944.

107

Answer to Cross Libel.

[SAME TITLE.]

The answer of the respondent to the libel herein as amended by this Court's order respectfully alleges upon information and belief as follows:

108 First: It denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph First, and demands strict proof thereof, that the vessel was tight, staunch, strong and in all respects seaworthy.

Second: It admits the allegations contained in Paragraph Second.

Third: It admits the allegations contained in Paragraph Third.

Fourth: It is not required to answer Paragraph Fourth.

Answer to Cross Libel.

Fifth: Except as hereinafter admitted, it denies the allegations contained in Paragraph Fifth. 109

Sixth: It denies the allegations contained in Paragraph Sixth.

Seventh: It denies the allegations contained in Paragraph Seventh.

Eighth: Paragraph Eighth of the libel has been stricken out.

Ninth: It admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court and, except as admitted, denies the remaining allegations contained in Paragraph Ninth. 110

FURTHER ANSWERING THE LIBEL HEREIN THE RESPONDENT ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

Tenth: The circumstances of the aforesaid collision were as follows: The "Nathaniel Bacon", loaded with a general cargo, lay anchored to the eastward of Tompkinsville, Staten Island. At about 7:05 a. m. she heaved anchor and with proper navigation lights burning, got under way, bound for Pier 35, North River. With her engines running at various speeds she proceeded very slowly and steadied on a course headed for Owl's Head Buoy No. 24. Daylight had not yet broken and a light rain was falling. The "Esso Belgium" was observed on the "Nathaniel Bacon's" port bow showing her green light. The "Nathaniel Bacon" sounded a one-blast whistle signal and the "Esso Belgium" answered with one blast. The "Nathaniel Bacon" continued ahead and permitted a United States Army dredge, which was approaching, to cross from the "Nathaniel Bacon's" port to starboard bow 111

112 and the "Bacon" passed under the stern of the dredge. Meanwhile, the "Esso Belgium", without reducing her speed or checking her headway, approached close aboard the port side of the "Nathaniel Bacon". The "Esso Belgium" was heard to sound a three-whistle backing signal and the alarm and to let go her starboard anchor, but she continued on with headway unabated and her bow came into violent collision with the port side of the "Nathaniel Bacon" in the way of No. 3 cargo hold and forward of the bridge.

113 Eleventh: The aforesaid collision and damage were not caused or contributed to by any fault or neglect on the part of the respondent or of the officers and crew of the SS "Nathaniel Bacon" but were caused solely by the fault and neglect of the MS "Esso Belgium" and those aboard and in charge of her in the following among other particulars which will be pointed out at the trial of this action:

1. In that those in charge of the MS "Esso Belgium" were careless, incompetent and inattentive to their duties.

114 2. In that the MS "Esso Belgium" was improperly manned and equipped.

3. In failing to have a lookout properly stationed and attending to his duties.

4. In failing to navigate to pass the "Nathaniel Bacon" as the situation required.

5. In failing to direct her course to her own starboard.

6. In failing to pass under the stern of the "Nathaniel Bacon".

7. In failing to stop and reverse in time to avoid collision.

8. In failing to make due allowance for wind and tide and to take into consideration the existing circumstances. 115

9. In failing to navigate in compliance with the one-whistle signal exchanged with the "Nathaniel Bacon".

10. In failing to keep out of the way of a privileged vessel.

11. In proceeding at an immoderate, improper and excessive speed.

12. In failing to sound proper whistle signals. 116

13. In failing to take any or any proper steps to avoid collision.

WHEREFORE, respondent prays that the cross-libel herein be dismissed with costs and disbursements.

JAMES B. M. MCNALLY,
United States Attorney,
Office and P. O. Address,
Room 618, 45 Broadway,
New York 6, New York. 117

(Verified by Vincent A. Catoggio, Jr., as Special Assistant, on March 4, 1944.)

Petition of United States of America to Implead Farr Sugar Corporation, et al.

To the Honorable the Judges of the United States District Court for the Southern District of New York

The petition of the United States of America, as owner of the SS "Nathaniel Bacon", to implead

Farr Sugar Corporation
Schieffelin & Company
Park & Tilford Import Corporation
Standard Food Products Corporation
P. Lorillard Company, Inc.
Lanborn & Company, Inc.
American Spirits Inc.
McKesson & Robbins Inc.
Canada Dry Ginger Ale, Inc.
R. C. A. Mfg. Company
"21" Brands Inc.
N. Duys & Company, Inc.
Hamburger Bros. & Company, Inc.
Porcella Vincini & Company, Inc.
General Cigar Company, Inc.
Durlach Bros., Inc.
S. Ruppin Inc.
Julius Wile Sons & Company, Inc.
L. W. Minford & Company, Inc.
V. Cassazza & Bro., Inc.
Equitable Trading Corporation
Picardy Mills Inc.
Cambridge Handkerchief Works, Inc.
Lande & Miskind Inc.
David E. Schwab & Company, Inc.
Bernhard Ulmann Company, Inc.
Joseph Love Inc.
J. Sklar Mfg. Company, Inc.
Red Star Button Company, Inc.

121

Tiny Town Togs Inc.
A. N. Saab Co., Inc.
Block Frères Inc.
Aris Gloves Inc.
J. H. Kimball, Inc.
David F. Schwab & Company, Inc.
J. Zurcher Company, Inc.
Nurse-Wear Hosiery Company, Inc.
Peter J. Michels Inc.
Guzofsky-Kalinsky Inc.
Hyman & Hyman Beauty Prod. Inc.

122

Arnold M. Ebbe Company, Inc.
Solex Laboratories Inc.
International General Elec. Company
The Hills Bros. Company
Porto Rican Express Company
Manhattan Shirt Company
J. Jolles Studios
I. Shalom & Company
Saxe Bendit Company
Handcraft Undergarment Company
General Handkerchief Company
Malina Company

123

F. Schumacher & Company
Miami Valley Tobacco Company
Plazuela Sugar Company
N. Y. & P. R. R. S. S. Company
Westinghouse Electric Int'l. Company
Mathieson Alkali Works Inc.
Nash-Kelvinator Company
The Frank Tea & Spice Company
I. Lewis Cigar Mfg. Company
Consolidated Cigar Corporation
The Virgin Islands Company
J. Stromeyer Company

124

Paris Beauty Supply Company
The Glemby Company, Inc.
Tin Salvage Institute
Delite Products Company
American Lady Specialties Mfg. Company
Gibbs & Company
M. B. Cohen Company
Lanza Silk Dyeing Company, Inc.
D'Angelo Silk Throwing Company
Brower Bros. Silk Company, Inc.
Leonard Custom Tailors Company

125

Lederle Laboratories Inc.
Tanners Shoe Company
Samuel & Benj. L. Grabosky (first name fictitious)
Bernard O. Clark (first name fictitious)
Kenneth Krack (first name fictitious)
Otto Muller
Ralph Williams
Gerald Udell
Mrs. Tom Ritchie
Walter E. Lord
Henry L. Gilgoff (first name fictitious)

126

Wilbur H. Holly
Robert A. Irizarry (first name fictitious)
Jose Ortiz
Margarite Jensen
Arthur E. Mann (first name fictitious)
Frank A. Delaney
Jacob Tanenbaum
Harry A. Nadler (first name fictitious)
Manuela Diaz
Joseph A. Rivera (first name fictitious)
Mrs. Daisy Terrano
Abraham Radinsky, doing business under the name Pacific Undergarment Company

127

David and Larry Kliven, doing business under the name Peerless Undergarment Company

P. E. Anderson—G. J. Briasco, doing business under the name John H. Rodriguez Company

John Bass, John B. Warnock, Theodore Mutter, doing business under the name L. W. & P. Armstrong Inc.

George, Michael, Joseph Mabarak, doing business under the name Mabarak Bros.

Julius Baer, Carl Badman, doing business under the name B. Dickson & Co.

Jules A. Des Angles, doing business under the name Jules A. Des Angles Co. Inc. 128

David A. and Selim A. Sutton, doing business under the name A. D. Sutton & Sons

Jacob Maleh, Sam and Jack Hamway, doing business under the name Maleh & Hamway

Rudolph and Harry Attillo, Sydney de Mea, doing business under the name De Mea Bros.

Ben Guzofsky, doing business under the name Ben Gee Sales Co.

George, Elias and Ameen Bardwil, doing business under the name George E. Bardwil & Sons

Nathan Lachoff, doing business under the name Estelle Dress & Sportswear Co. 129

Juan Mas, doing business under the name J. Mas & Co.

Samuel Rochelson, David Rudolf, doing business under the name Osage Handkerchief Co.,

pursuant to the 56th Rule in Admiralty, to the libel and complaint of Belgian Overseas Transports, S. A., as owner of the MS "Esso Belgium", against the United States of America, as owner of the SS "Nathaniel Bacon", in an

130 alleged cause of collision, civil and maritime, respectfully shows on information and belief as follows:

First: That the petitioner, United States of America, is now, and at all the times hereinafter mentioned was, a corporation sovereign and the owner of the SS "Nathaniel Bacon".

Second: At all the times hereinafter mentioned the respondents-impleaded, whose names are set forth in this article were, and now are, corporations duly organized
131 and existing under the laws of the states set forth below:

Lamborn & Co., Inc., Standard Food Products Corp., Park & Tilford Import Corp., "21" Brands Inc., Schieffelin & Co., P. Lorillard Co., Inc., H. Duys & Co., Inc., Hamburger Bros. & Co., Inc., International General Electric Co., Porcella Vincini & Co., Inc., General Cigar Co., Inc., Durlach Bros., Inc., S. Ruppin Inc., Julius Wile Sons & Co., Inc., The Hills Bros., Co., Farr Sugar Corp., L. W. Minford & Co., Inc., V. Cassazza & Bro., Inc., Equitable Trading Corp., Picardy Mills Inc., Cambridge Hand-
132 kerchief Works, Inc., Porto Rican Express Co., Lande & Miskind Inc., David E. Schwab & Co., Inc., Manhattan Shirt Co., Bernhard Ulmann Co., Inc., Joseph Love, Inc., J. Sklar Mfg. Co., Inc., Red Star Button Co., Inc., J. Jolles Studios, Tiny Town Togs, Inc., A. N. Saab Co., Inc., I. Shalom & Co., Block Freres Inc., Saxe Bendit Co., Aris Gloves Inc., Handcraft Undergarment Co., J. H. Kimball Inc., David E. Schwab & Co., Inc., General Handkerchief Co., J. Zurcher Co., Inc., Nurse-Wear Hosiery Co., Inc., Peter J. Michels Inc., Guzofsky-Kalinsky Inc., Hyman & Hyman Beauty Prod. Inc.,

133

Malina Co., F. Schumacher & Co., Arnold M. Ebbe Co., Inc., Solex Laboratories, Inc., all under the laws of the State of New York;

Westinghouse Electric Int'l Co., Canada Dry Ginger Ale, Inc., Consolidated Cigar Corp., The Glemby Co., Inc., Lederle Laboratories, Inc., all under the laws of the State of Delaware;

Mathieson Alkali Works Inc., under the laws of the State of Virginia;

American Spirits Inc., McKesson & Robbins Inc., both under the laws of the State of Maryland;

Nash-Kelvinator Co., under the laws of the State 134 of Michigan;

Miami Valley Tobacco Co., Plazuela Sugar Co., N. Y. & P. R. R. S. S. Co., The Frank Tea & Spice Co., I. Lewis Cigar Mfg. Co., The Virgin Island Co., J. Stromeyer Co., M. B. Cohen Co., Paris Beauty Supply Co., Tin Salvage Institute, R. C. A. Mfg. Co., Delite Products Co., American Lady Specialties Mfg. Co., Gibbs & Co., Lanza Silk Dyeing Co., D'Angelo Silk Throwing Co., Brower Bros. Silk Co., Inc., Leonard Custom Tailors Co., Tanners Shoe Co., all are foreign corporations.

135

Third: Heretofore, and on or about December 24, 1942, a libel was filed in this court by the Belgian Overseas Transports, S. A., as owner of MS "Esso Belgium", against the United States of America, as owner of the SS "Nathaniel Bacon", which under date of February 14, 1944 was amended and in which it is alleged that the MS "Esso Belgium" and her owners were caused to sustain damage in the sum of $20,000. as the result of a collision on November 24, 1942 in New York Harbor between the MS "Esso Belgium" and the SS "Nathaniel Bacon"; and the said libel as amended further alleges

136 that the cross-libelant claims against United States of America the amount, if any, which cross-libelant or MS "Esso Belgium" may be held liable to pay to any person or corporation with respect to damages alleged to have been sustained in consequence of or in connection with said collision by any cargo on board SS "Nathaniel Bacon".

Fourth: The true facts and circumstances of the said collision, upon information and belief, are as follows:

137 The "Nathaniel Bacon", loaded with a general cargo, lay anchored to the eastward of Tompkinsville, Staten Island. At about 7:05 a. m. she heaved anchor and with proper navigation lights burning, got under way, bound for Pier 35, North River. With her engines running at various speeds she proceeded very slowly and steadied on a course headed for Owl's Head Buoy No. 24. Daylight had not yet broken and a light rain was falling. The "Esso Belgium" was observed on the "Nathaniel Bacon's" port bow showing her green light. The "Nathaniel Bacon" sounded a one-blast whistle signal and the "Esso Belgium" answered with one

138 blast. The "Nathaniel Bacon" continued ahead and permited a United States Army dredge, which was approaching, to cross from the "Nathaniel Bacon's" port to starboard bow and the "Bacon" passed under the stern of the dredge. Meanwhile, the "Esso Belgium", without reducing her speed or checking her headway, approached close aboard the port side of the "Nathaniel Bacon". The "Esso Belgium" was heard to sound a three-whistle backing signal and the alarm and to let go her starboard anchor, but she continued on with headway unabated and her bow came into violent collision with the port side of the "Nathaniel Bacon" in

139

the way of No. 3 cargo hold and forward of the bridge.

Fifth: The aforesaid collision and damage were not caused or contributed to by any fault or neglect on the part of the respondent or of the officers and crew of the SS "Nathaniel Bacon" but were caused solely by the fault and neglect of the MS "Esso Belgium" and those aboard and in charge of her in the following among other particulars which will be pointed out at the trial of this action:

1. In that those in charge of the MS "Esso Belgium" were careless, incompetent and inattentive to their duties. 140
2. In that the MS "Esso Belgium" was improperly manned and equipped.
3. In failing to have a lookout properly stationed and attending to his duties.
4. In failing to navigate to pass the "Nathaniel Bacon" as the situation required.
5. In failing to direct her course to her own starboard.

141

6. In failing to pass under the stern of the "Nathaniel Bacon".
7. In failing to stop and reverse in time to avoid collision.
8. In failing to make due allowance for wind and tide and to take into consideration the existing circumstances.
9. In failing to navigate in compliance with the one-whistle signal exchange with the "Nathaniel Bacon".

142

10. In failing to keep out of the way of a privileged vessel.

11. In proceeding at an immoderate, improper and excessive speed.

12. In failing to sound proper whistle signals.

13. In failing to take any, or any proper, steps to avoid collision.

Sixth: Pursuant to order of this court, dated April 6,
143 1943, the Atlantic Mutual Insurance Company and fifteen other insurance companies filed a petition of intervention in this Court in an action theretofore instituted by the United States of America, as owner of the SS "Nathaniel Bacon", against the MS "Esso Belgium", in which the said petitioning intervenors alleged that they were the insurers and their assureds were the owners and/or shippers and/or consignees of cargo laden on the SS "Nathaniel Bacon", and in which petitioning intervenors state that they or their assureds have been damaged in the sum of $200,000., and in which they demand from the MS "Esso Belgium" their damages for their own interest and as
144 agents or trustees for their respective assureds and make claim on behalf of, and for the interest of, all parties who may be, or may become, interested in the shipments on board the SS "Nathaniel Bacon".

Seventh: Petitioner further alleges that the cargo mentioned in the libel herein as amended was shipped on the SS "Nathaniel Bacon" from San Juan, Puerto Rico, to be transported to New York according to certain bills of lading duly signed and delivered to the shipper in consideration of payment of certain freight.

145

Said bills of lading, a photostatic copy of which is annexed hereto and made a part hereof, constituted the contract of carriage under which said cargo was transported and contained among others the following provisions:

"9. If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will 146 indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier.

The foregoing provisions shall also apply where the owners, operators or those in charge of any 147 ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact."

Eighth: In the event the Court concludes that said collision and damages resulting therefrom to the cross-libelant and/or the intervening sixteen insurance companies referred to in Paragraph Sixth hereof were caused by negligent navigation of both the "Esso Belgium" and the "Nathaniel Bacon", then and in that event the intervening sixteen insurance companies for their own account and the account of the respondents-impleaded herein will

148 recover their damages in full from the "Esso Belgium", whereupon the amount so adjudged to be paid by the "Esso Belgium" would become part of the damages sustained by the cross-libelant herein, Belgian Overseas Transports, S. A., as owner and claimant of the MS "Esso Belgium", as a result of the collision, and one-half thereof would be recovered by the latter by way of set off, recoupment or otherwise from the United States of America, as owner of the "Nathaniel Bacon". In that event, under the terms of Clause IX of the contract of
149 carriage under which said cargo was transported, the provisions of which are set forth in Paragraph Seventh hereof, petitioner is entitled to be indemnified by the respondents-impleaded, as owners of said cargo, to the amount which the "Esso Belgium" and Belgian Overseas Transports, S. A., her owner and cross-libelant herein, recovers from respondent by way of set off, recoupment or otherwise on account of damage to cargo laden on board the "Nathaniel Bacon" at the time of the above-mentioned collision.

Ninth: By reason of the premises, Farr Sugar Cor-
150 poration and all the other respondents-impleaded mentioned herein are liable herein for whatever amount, if any, the "Esso Belgium" and/or her owners, the cross-libelant, recover herein from the respondent and/or the "Nathaniel Bacon" by way of set off, recoupment or otherwise on account of damage sustained by cargo laden on the "Nathaniel Bacon" at the time of the above-mentioned collision, and they are therefore necessary and proper parties defendant in this suit and ought to be proceeded against herein.

Tenth: Petitioner files herewith its answer to the cross-libel herein.

Petition of United States of America to Implead Farr Sugar Corporation, et al.

Eleventh: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, petitioner prays that process may issue, citing the Farr Sugar Corporation and each and every other respondent-impleaded whose name appears in the caption of this petition, to appear and answer this petition, to the effect that said respondent-impleaded may be proceeded against in this suit for the amount which the "Esso Belgium" or Belgian Overseas Transports, S. A., may recover from the United States of America by way of set off, recoupment or otherwise on account of any payment made to the intervening sixteen insurance companies referred to in Paragraph Sixth herein for damage to cargo resulting from the above mentioned collision, and that the Court will dismiss the libel herein as against the United States of America, and that the petitioner may have such other and further relief as the justice of the cause may require.

JAMES B. M. MCNALLY,
United States Attorney,
Office and P. O. Address,
Room 618, 45 Broadway,
New York 6, New York.

(Verified by Vincent A. Catoggio, Jr., as Special Assistant, on March 4, 1944.)

BILL OF LADING, ANNEXED TO PETITION OF UNITED STATES OF AMERICA TO IMPLEAD FARR SUGAR CORPORATION, ET AL.

154

1. This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States of America, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the Carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. The provisions stated in said Act (except as may be otherwise specifically provided herein) shall govern before
155 the goods are loaded on and after they are discharged from the ship and throughout the entire time the goods are in the custody of the Carrier. The Carrier shall not be liable in any capacity whatsoever for any delay, non-delivery or mis-delivery, or loss of or damage to the goods occurring while the goods are not in the actual custody of the Carrier. If this bill of lading is issued in a locality where there is in force a Carriage of Goods by Sea Act or Ordinance or Statute of a similar nature to the International Convention for the Unification of Certain Rules Relating to Bills of Lading at Brussels of August 25, 1924,
156 it is subject to the provisions stated in such Act, Ordinance and rules thereto annexed which may be in effect where this bill of lading is issued.

(a) The Carrier shall be entitled to the full benefit of, and right to, all limitations of, or exemptions from, liability authorized by any provisions of Sections 4281 to 4286 of the Revised Statutes of the United States and amendments thereto and of any other provisions of the laws of the United States or of any other country whose laws shall apply. If the ship is not owned by or chartered by demise to the War Shipping Administration or the Company designated herein (as may be the case notwithstanding anything that appears to the contrary) this

157

bill of lading shall take effect only as a contract with the owner or demise charterer, as the case may be, as principal, made through the agency of the War Shipping Administration or the Company designated herein which acts as agent only and shall be under no personal liability whatsoever in respect thereof. If, however, it shall be adjudged that any other than the owner or demise charterer is carrier and/or bailee of the goods all limitations of and exonerations from liability provided by law or by the terms hereof shall be available to such other.

158

2. In this bill of lading the word "ship" shall include any substituted vessel, and any craft, lighter or other means of conveyance owned, chartered or operated by the Carrier used in the performance of this contract; the word "Carrier" shall include the ship, her owner, master, operator, demise charterer, and if bound hereby the time charterer, and any substituted carrier, whether the owner, operator, charterer, or master shall be acting as carrier or bailee; the word "shipper" shall include the person named as such in this bill of lading and the person for whose account the goods are shipped; the word "consignee" shall include the holder of the bill of lading, properly endorsed, and the receiver and the owner of the goods; the word "charges" shall include freight and all expenses and money obligations incurred and payable by the goods, shipper, consignee, or any of them.

159

3. The scope of voyage herein contracted for shall include usual or customary or advertised ports of call whether named in this contract or not, also ports in or out of the advertised, geographical, usual or ordinary route or order, even though in proceeding thereto the ship may sail beyond the port of discharge or in a direction contrary thereto or return to the original port, or depart

160 from the direct or customary route, and includes all canals, straits and other waters. The ship may call at any port for the purposes of the current voyage or of a prior or subsequent voyage. The ship may omit calling at any port or ports whether scheduled or not, and may call at the same port more than once; may for matters occurring before loading the goods, known or unknown at the time of such loading and matters occurring after such loading, either with or without the goods or passengers on board, and before or after proceeding toward the port of dis-
161 charge, adjust compasses, dry dock, with or without cargo aboard go on ways or to repair yards, shift berths, make trial trips or tests, take fuel or stores, remain in port, sail with or without pilots, tow and be towed, and save or attempt to save life or property; and all of the foregoing are included in the contract voyage.

4. In any situation whatsoever and wheresoever occurring and whether existing or anticipated before commencement of or during the voyage, which in the judgment of the Carrier or the Master is likely to give rise to risk of capture, seizure, detention, damage, delay or dis-
162 advantage to or loss of the ship or any part of her cargo, to make it unsafe, imprudent, or unlawful for any reason to commence or proceed on or continue the voyage or to enter or discharge the goods at the port of discharge, or to give rise to delay or difficulty in arriving, discharging at or leaving the port of discharge or the usual or agreed place of discharge in such port, the Carrier may before loading or before the commencement of the voyage, require the shipper or other person entitled thereto to take delivery of the goods at port of shipment and upon failure to do so, may warehouse the goods at the risk and expense of the goods; or the Carrier or the Master, whether or not proceeding toward or entering or attempting to enter

163

the port of discharge or reaching or attempting to reach the usual place of discharge therein or attempting to discharge the goods there, may discharge the goods into depot, lazaretto, craft, or other place; or the ship may proceed or return, directly or indirectly, to or stop at any port or place whatsoever as the Master or the Carrier may consider safe or advisable under the circumstances, and discharge the goods, or any part thereof, at any such port or place; or the Carrier or the Master may retain the cargo on board until the return trip or until such time as the Carrier or the Master thinks advisable and discharge the goods at any place whatsoever as herein provided; or the Carrier or the Master may discharge and forward the goods by any means, rail, water, land, or air at the risk and expense of the goods. The Carrier or the Master is not required to give notice of discharge of the goods or the forwarding thereof as herein provided. When the goods are discharged from the ship, as herein provided, they shall be at their own risk and expense; such discharge shall constitute complete delivery and performance under this contract and the Carrier shall be freed from any further responsibility. For any services rendered to the goods as hereinabove provided, the Carrier shall be entitled to a reasonable extra compensation.

164

165

5. The Carrier, Master and ship shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the

166 war risk insurance on the ship, the right to give such orders or directions. Delivery or other disposition of the goods in accordance with such orders or directions shall be a fulfillment of the contract voyage. The ship may carry contraband, explosives, munitions, warlike stores, hazardous cargo, and may sail armed or unarmed and with or without convoy.

In addition to all other liberties herein the Carrier shall have the right to withhold delivery of, reship to, deposit or discharge the goods at any place whatsoever, surrender
167 or dispose of the goods in accordance with any direction, condition or agreement imposed upon or exacted from the Carrier by any government or department thereof or any person purporting to act with the authority of either of them. In any of the above circumstances the goods shall be solely at their risk and expense and all expenses and charges so incurred shall be payable by the shipper or consignee thereof and shall be a lien on the goods.

6. Unless otherwise stated herein, the description of the goods and the particulars of the packages mentioned herein are those furnished in writing by the shipper and
168 the Carrier shall not be concluded as to the correctness of marks, number, quantity, weight, gauge, measurement, contents, nature, quality or value. Single pieces or packages exceeding 4480 lbs. in weight shall be liable to pay extra charges in accordance with tariff rates in effect at time of shipment for loading, handling, transshipping or discharging and the weight of each such piece or package shall be declared in writing by the shipper on shipment and clearly and durably marked on the outside of the piece or package. The shipper and the goods shall also be liable for, and shall indemnify the Carrier in respect of any injury, loss or damage arising from shipper's failure to declare and mark the weight of any such piece

or package or from inadequate or improper description of the goods or from the incorrect weight of any such piece or package having been declared or marked thereon, or from failure fully to disclose the nature and character of the goods.

7. Goods may be stowed in poop, forecastle, deck house, shelter deck, passenger space or any other covered in space commonly used in the trade and suitable for the carriage of goods, and when so stowed shall be deemed for all purposes to be stowed under deck. In respect of goods carried on deck all risks of loss or damage by perils inherent in such carriage shall be borne by the shipper or the consignee but in all other respects the custody and carriage of such goods shall be governed by the terms of this bill of lading and the provisions stated in said Carriage of Goods by Sea Act notwithstanding Sec. 1 (c) thereof, or the corresponding provision of any Carriage of Goods by Sea Act that may be applicable. Specially heated or specially cooled stowage is not to be furnished unless contracted for at an increased freight rate. Goods or articles carried in any such compartment are at the sole risk of the owner thereof and subject to all the conditions, exceptions and limitations as to the Carrier's liability and other provisions of this bill of lading; and further the Carrier shall not be liable for any loss or damage occasioned by the temperature, risks of refrigeration, defects or insufficiency in or accidents to or explosion, breakage, derangement or failure of any refrigerator plant or part thereof, or by or in any material or the supply or use thereof used in the process of refrigeration unless shown to have been caused by negligence of the Carrier from liability for which the Carrier is not by law entitled to exemption.

Bill of Lading, Annexed to Petition of United States of America to Implead Farr Sugar Corporation, et al.

172

8. Live animals, birds, reptiles and fish are received and carried at shipper's risk of accident or mortality, and the Carrier shall not be liable for any loss or damage thereto arising or resulting from any matters mentioned in Section 4, Sub-section 2, a to p inclusive of said Carriage of Goods by Sea Act or similar sections of any Carriage of Goods by Sea Act that may be applicable, or from any other cause whatsoever not due to the fault of the Carrier, any warranty of seaworthiness in the premises being hereby waived by the shipper. Except as provided above such shipments shall be deemed goods, and shall be
173 subject to all terms and provisions in this bill of lading relating to goods.

9. If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or
174 damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier.

The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact.

10. General average shall be adjusted, stated and settled, according to Rules 1 to 15, inclusive, 17 to 22, in-

175

clusive, and Rule F of York-Antwerp Rules 1924, at such port or place in the United States as may be selected by the Carrier, and as to matters not provided for by these Rules, according to the laws and usages at the port of New York. In such adjustment disbursements in foreign currencies shall be exchanged into United States money at the rate prevailing on the dates made and allowances for damage to cargo claimed in foreign currency shall be converted at the rate prevailing on the last day of discharge at the port or place of final discharge of such damaged cargo from the ship. Average agreement or bond and such additional security, as may be required 176
by the Carrier, must be furnished before delivery of the goods. Such cash deposit as the Carrier or his agents may deem sufficient as additional security for the contribution of the goods and for any salvage and special charges thereon, shall, if required, be made by the goods; shippers, consignees or owners of the goods to the Carrier before delivery. Such deposit shall, at the option of the Carrier, be payable in United States money and be remitted to the adjuster. When so remitted the deposit shall be held in a special account at the place of adjustment in the name of the adjuster pending settlement of the General Average and refunds or credit balances, if any, shall 177
be paid in United States money.

In the event of accident, danger, damage, or disaster, before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Carrier is not responsible, by statute, contract, or otherwise, the goods, the shipper and the consignee, jointly and severally, shall contribute with the Carrier in general average to the payment of any sacrifices, losses, or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges

178 incurred in respect of the goods. If a salving ship is owned or operated by the Carrier, salvage shall be paid for as fully and in the same manner as if such salving ship or ships belonged to strangers.

11. Whenever the Carrier or the Master may deem it advisable or in any case where the goods are consigned to a point where the ship does not expect to discharge, the Carrier or Master may, without notice, forward the whole or any part of the goods before or after loading at the original port of shipment, or any other place or
179 places even though outside the scope of the voyage or the route to or beyond the port of discharge or the destination of the goods, by any vessel, vessels or other means of transportation by water or by land or by air or by any such means, whether operated by the Carrier or by others and whether departing or arriving or scheduled to depart or arrive before or after the ship expected to be used for the transportation of the goods. This Carrier, in making arrangements for any transshipping or forwarding vessel or means of transportation not operated by this Carrier shall be considered solely the forwarding agent of the
180 shipper and without any other responsibility whatsoever.

The carriage by any transshipping or forwarding carrier and all transshipment or forwarding shall be subject to all the terms whatsoever in the regular form of bill of lading, freight note, contract or other shipping document used at the time by such carrier, whether issued for the goods or not, and even though such terms may be less favorable to the shipper or consignee than the terms of this bill of lading and may contain more stringent requirements as to notice of claim or commencement of suit and may exempt the on-carrier from liability for negligence. The shipper expressly authorizes the Carrier to arrange with any such transshipping or forwarding

carrier that the lowest valuation of the goods or limitation of liability contained in the bill of lading or shipping document of such carrier shall apply even though lower than the valuation or limitation herein, provided that the shipper shall not be compelled to pay a rate higher than that applicable to the valuation contained in such bill of lading. Pending or during transshipment the goods may be stored ashore or afloat at their risk and expense and the Carrier shall not be liable for detention. 181

12. The port authorities are hereby authorized to grant a general order for discharging immediately upon arrival of the ship and the Carrier without giving notice either of arrival or discharge, may discharge the goods directly they come to hand, at or onto any wharf, craft or place that the Carrier may select, and continuously Sundays and holidays included, at all such hours by day or by night as the Carrier may determine no matter what the state of the weather or custom of the port may be. The Carrier shall not be liable in any respect whatsoever if heat or refrigeration or special cooling facilities shall not be furnished during loading or discharge or any part of the time that the goods are upon the wharf, craft, or other loading or discharging place. All lighterage and use of craft in discharging shall be at the risk and expense of the goods. Landing and delivery charges and pier dues shall be at the expense of the goods unless included in the freight herein provided for. If the goods are not taken away by the consignee by the expiration of the next working day after the goods are at his disposal, the goods may at Carrier's option and subject to Carrier's lien, be sent to store or warehouse or be permitted to lie where landed, but always at the expense and risk of the goods. The responsibility of the Carrier in any capacity shall altogether cease and the goods shall be considered to be 182 183

184 delivered and at their own risk and expense in every respect when taken into the custody of customs or other authorities. The Carrier shall not be required to give any notification of disposition of the goods.

13. The Carrier shall not be liable for failure to deliver in accordance with marks unless such marks shall have been clearly and durably stamped or marked by the shipper before shipment upon the goods or packages, in letters and numbers not less than two inches high, together with name of the port of discharge. Goods that
185 cannot be identified as to marks or numbers, cargo sweepings, liquid residue and any unclaimed goods not otherwise accounted for shall be allocated for completing delivery to the various consignees of goods of like character, in proportion to any apparent shortage, loss of weight or damage. Loss or damage to goods in bulk stowed without separation from other goods in bulk of like quality, shipped by either the same or another shipper, shall be divided in proportion among the several shipments.

14. The goods shall be liable for all expense of mend-
186 ing, cooperage, baling or reconditioning of the goods or packages and gathering of loose contents of packages; also for any payment, expense, fine, dues, duty, tax, impost, loss, damage or detention sustained or incurred by or levied upon the Carrier or the ship in connection with the goods, howsoever caused, including any action or requirement of any government or governmental authority or person purporting to act under the authority thereof, seizure under legal process or attempted seizure, incorrect or insufficient marking, numbering or addressing of packages or description of the contents, failure of the shipper to procure consular, Board of Health or other certificates to accompany the goods or to comply with laws or regu-

187

lations of any kind imposed with respect to the goods by the authorities at any port or place or any act or omission of the shipper or consignee.

15. Freight shall be payable on actual gross intake weight or measurement or, at Carrier's option, on actual gross discharged weight or measurement. Freight may be calculated on the basis of the particulars of the goods furnished by the shipper herein but the Carrier may at any time open the packages and examine, weigh, measure and value the goods. In case shipper's particulars are found to be erroneous and additional freight is payable, 188
the goods shall be liable for any expense incurred for examining, weighing, measuring and valuing the goods. Full freight shall be paid on damaged or unsound goods. Full freight hereunder to port of discharge named herein shall be considered completely earned on shipment whether the freight be stated or intended to be prepaid or to be collected at destination; and the Carrier shall be entitled to all freight and charges due hereunder, whether actually paid or not, and to receive and retain them irrevocably under all circumstances whatsoever ship and/or cargo lost or not lost or the voyage broken up or abandoned. 189
If there shall be a forced interruption or abandonment of the voyage at the port of shipment or elsewhere any forwarding of the goods or any part thereof shall be at the risk and expense of the goods. All unpaid charges shall be paid in full and without any offset, counterclaim or deduction in the currency of the port of shipment, or, at Carrier's option, in the currency of the port of discharge at the demand rate of New York exchange as quoted on the day of the ship's entry at the Custom House of her port of discharge. The Carrier shall have a lien on the goods, which shall survive delivery, for all charges due hereunder and may enforce this lien by public or private

190

sale and without notice. The shipper and the consignee shall be jointly and severally liable to the Carrier for the payment of all charges and for the performance of the obligation of each of them hereunder.

16. Neither the Carrier nor any corporation owned by, subsidiary to or associated or affiliated with the Carrier shall be liable to answer for or make good any loss or damage to the goods occurring at any time and even though before loading on or after discharge from the ship, by reason or by means of any fire whatsoever, unless
191 such fire shall be caused by its design or neglect.

17. In case of any loss or damage to or in connection with goods exceeding in actual value $500 lawful money of the United States, per package, or, in case of goods not shipped in packages, per customary freight unit, the value of the goods shall be deemed to be $500 per package or per unit, on which basis the freight is adjusted and the Carrier's liability, if any, shall be determined on the basis of a value of $500 per package or per customary freight unit, or pro rata in case of partial loss or dam-
192 age, unless the nature of the goods and a valuation higher than $500 shall have been declared in writing by the shipper upon delivery to the Carrier and inserted in this bill of lading and extra freight paid if required and in such case if the actual value of the goods per package or per customary freight unit shall exceed such declared value, the value shall nevertheless be deemed to be the declared value and the Carrier's liability, if any, shall not exceed the declared value and any partial loss or damage shall be adjusted pro rata on the basis of such declared value.

Whenever the value of the goods is less than $500 per package or other freight unit, their value in the calcula-

193

tion and adjustment of claims for which the Carrier may be liable shall for the purpose of avoiding uncertainties and difficulties in fixing value be deemed to be the invoice value, plus freight and insurance if paid, irrespective of whether any other value is greater or less.

18. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the Carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence 194
of the delivery by the Carrier of the goods as described in the bill of lading. If the loss or damage is not apparent the notice must be given within three days of the delivery. The Carrier shall not be liable upon any claim for loss or damage unless written particulars of such claim shall be received by the Carrier within thirty days after receipt of the notice herein provided for.

19. In any event the Carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery 195
of the goods or the date when the goods should have been delivered. Suit shall not be deemed brought until jurisdiction shall have been obtained over the Carrier and/or the ship by service of process or by an agreement to appear.

20. To avoid or alleviate preventions or delays in prosecution or completion of the voyage incident to the existence of hostilities, the Carrier has liberty and is authorized by the shipper and the owner of the goods to agree with the representatives of any government to submit the goods to examination at any place or places

196 whatsoever and to delay delivery of the same until any restriction asserted by any governmental authority shall have been removed. The Carrier may put the goods in store ashore or afloat at the risk and expense of the owner of the same pending examination; and thereupon the Carrier's responsibility shall end. Any damage or deterioration occasioned by such examination or by delay and other risks of whatsoever nature shall be solely for account of the owner of the goods. All expenses incurred by the Carrier in relation to such detention of the goods shall be
197 paid by the shipper or consignee or owner of the goods.

21. This Bill of Lading shall be construed and the rights of the parties thereunder determined according to the law of the United States.

22. Cargo skids and labor on quay are to be provided by ship's agent for account of consignee at current rates, and any cargo which may be ordered for delivery into fiscal deposits, must be taken by an official cartman appointed by the agent of the ship, at current rates for account and risk of consignee.

198 23. If any bagged or baled goods are landed slack or torn, receiver and/or consignee shall accept its proportion of the sweepings. Ship not responsible for loss of weight in bags or bales torn, mended or with sample holes.

24. Cotton: Description of the condition of the cotton does not relate to the insufficiency of or torn condition of the covering, nor to any damage resulting therefrom and Carrier shall not be responsible for damage of such nature.

25. Specie: Specie will not be shipped or landed by the Carrier; it must be put on board by the shipper, and

199

will only be delivered on board on presentation of the bills of lading properly endorsed; it may be carried on at consignee's risk if delivery is not taken during the ship's stay in port, and in every case the liability of the Carrier shall cease when the specie leaves the ship's deck.

26. SPECIFIED DOCK DISCHARGE: If the carrier makes a special agreement, whether by stamp hereon or otherwise, to deliver the goods hereby receipted for at a specified dock or wharf at the port of discharge, it is mutually agreed that such agreement shall be construed to mean that the Carrier is to make such delivery only if, in the 200
sole judgment of the Master, the ship can safely under her own power, proceed to, lie at, and return from said dock or wharf, always afloat at any time of tide, and only if such dock or wharf is available to the ship immediately the ship is ready to discharge the goods and, that otherwise, the ship shall discharge the goods in accordance with Clause 12 of this bill of lading, whereupon Carrier's responsibility shall cease.

28. All agreements or freight engagements for the shipment of the goods are superseded by this bill of lading, 201
and all its terms, whether written, typed, stamped, or printed, are accepted and agreed by the shipper to be binding as fully as if signed by the shipper, any local customs or privileges to the contrary notwithstanding. Nothing in this bill of lading shall operate to limit or deprive the Carrier of any statutory protection or exemption from or limitation of liability. If required by the Carrier, one signed bill of lading duly endorsed must be surrendered to the agent of the ship at the port of discharge in exchange for delivery order.

Answer of Farr Sugar Corporation and American Spirits, Inc., Respondents Impleaded, to Petition of United States of America.

202

[SAME TITLE.]

To the Honorable the Judges of the United States District Court for the Southern District of New York.

The answer of Farr Sugar Corporation and American Spirits, Inc., respondents impleaded, to the petition of the United States of America, as owner of the S. S. "Nathaniel Bacon", respectfully alleges, upon information and belief, as follows:

203

First: Admit the allegations set forth in article First.

Second: Admit the allegations set forth in article Second.

Third: Admit the allegations set forth in article Third.

Fourth: Admit that the collision between the S. S. "Nathaniel Bacon" and the "Esso Belgium" occurred substantially as alleged in article Fourth.

204

Fifth: Admit that the M/S "Esso Belgium" was at fault in one or more of the respects alleged in article Fifth.

Deny that they have any knowledge or information sufficient to form a belief as to the remaining allegations of article Fifth.

Sixth: Admit the allegations set forth in article Sixth.

Seventh: Admit that the cargo laden on the S. S. "Nathaniel Bacon" was carried under bills of lading in

205

form similar to that attached to the petition which contained, among other provisions, the clause set forth in article Seventh and respondents beg leave to refer to the original bills of lading for the complete provisions of the same.

Eighth: Answering article Eighth of said petition respondents impleaded deny that in the event the Court concludes that the collision referred to in the petition and the resulting damages were caused by or resulted from negligent navigation of both the "Esso Belgium" and the 206
"Nathaniel Bacon", petitioner, under the terms of Clause 9 of the contracts of carriage under which the cargo on the "Nathaniel Bacon" was transported, the provisions of which are set forth in article Seventh of the petition, is entitled to be indemnified by the respondents impleaded as owners of said cargo to the amount which the "Esso Belgium" and Belgian Overseas Transport, S. A., her owner and cross-libellant herein, recovers from respondents by way of setoff, recoupment or otherwise, on account of damage to cargo laden on board the "Nathaniel Bacon" at the time of the aforesaid collision.

Further answering, respondents impleaded admit the 207
remaining allegations set forth in article Eighth of the petition.

Ninth: Deny each and every allegation set forth in article Ninth.

Tenth: Admit the allegations set forth in article Tenth.

Eleventh: Admit the admiralty and maritime jurisdiction of the United States and of this Honorable Court and

208

deny each and every other allegation set forth in article Eleventh.

FURTHER ANSWERING SAID IMPLEADING PETITION RESPONDENTS-IMPLEADED ALLEGE:

Twelfth: That the provisions of the clause of the bill of lading quoted in paragraph Seventh of the impleading petition are invalid, illegal, contrary to the statutes of
209 the United States and contrary to public policy and are therefore void.

Thirteenth: All and singular the premises are true.

WHEREFORE, respondents-impleaded pray that the impleading petition herein be dismissed with costs and for such other and further relief as may appear just and proper.

BIGHAM, ENGLAR, JONES & HOUSTON,
Proctors for Farr Sugar Corporation
and American Spirits, Inc. Respond-
210 ents-Impleaded,
Office & P. O. Address,
99 John Street,
New York, New York.

(Verified by E. M. Jonklass, as Vice-President of Farr Sugar Corporation, one of the respondents-impleaded, on October 18, 1944.)

Stipulation of Facts.

UNITED STATES DISTRICT COURT, 211

SOUTHERN DISTRICT OF NEW YORK.

A 126-101

UNITED STATES OF AMERICA, as owner of the S. S. "NATHANIEL BACON", and as bailee of her cargo,

Libellant,

—against—

M. V. "ESSO BELGIUM", her engines, boilers, tackle, etc.,

Respondent,

ATLANTIC MUTUAL INSURANCE COMPANY, et al., 212

Intervening Petitioner.

A 126-167

BELGIAN OVERSEAS TRANSPORT, S. A., as owner of the M. V. "ESSO BELGIUM",

Libellant,

—against—

UNITED STATES OF AMERICA, as owner of the S. S. "NATHANIEL BACON",

Respondent,

FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., et al., 213

Impleaded.

STIPULATION.

An agreement having been reached between the parties to the above proceedings that the collision referred to in the pleadings occurred by reason of mutual fault on the part of the M. V. "Esso Belgium" and the S. S. "Nathaniel Bacon", the following stipulation is entered into for the purpose of facilitating the presentation to the Court for decision of the issue raised between the United States of America, as petitioner, and the owners of the cargo

214 laden on the S. S. "Nathaniel Bacon", as respondents impleaded, by the impleading petition of the United States of America filed on or about May 6, 1944 and the answer thereto of Farr Sugar Corporation and American Spirits, Inc., respondents impleaded, filed on or about November 24, 1944, it having been agreed that disposition of this issue as between the United States of America and said two respondents impleaded will control the disposition of said issue as to other respondents impleaded.

For the purpose of this submission, it is therefore stipulated:

215

1. The collision between the M. V. "Esso Belgium" and the S. S. "Nathaniel Bacon" on November 24, 1942, referred to in the pleadings herein, occurred by reason of negligence and fault in navigation on the part of both vessels, and the said collision and any loss or damage sustained by any of the parties hereto as a result of said collision occurred without the act, fault or neglect of the shippers, consignees, owners or insurers of cargo laden on the S. S. "Nathaniel Bacon", their agents, or their servants.

216 2. At and prior to the beginning of the voyage upon which said collision occurred and at all other material times, the "Nathaniel Bacon" was seaworthy, properly manned, equipped and supplied, and her holds and other parts of the vessel in which goods were carried were fit and safe for their reception, carriage and preservation, and the cargo laden on said vessel was properly stowed, and all steps were properly taken for the protection and preservation of said cargo.

3. The respondents impleaded, Farr Sugar Corporation and American Spirits, Inc., are, and at all the times

hereinafter mentioned were, corporations organized and 217
existing under and by virtue of the laws of the States of New York and Maryland, respectively, and at the time of the collision between the M. V. "Esso Belgium" and the S. S. "Nathaniel Bacon" were the owners of certain cargo laden on the S. S. "Nathaniel Bacon" and the holders of bills of lading issued therefor by the petitioner United States of America as carrier as follows:

B/L Nos.	Shipper	Consignee	Cargo
85-86	Farr Sugar Corporation	Farr Sugar Corporation	15,200 bags sugar
55-60	Cia. Ron Carioca Destileria, Inc.	American Spirits, Inc.	600 bbls. rum

218

Said bills of lading were in form identical with the bill of lading a copy of which is annexed to the impleading petition of the United States hereinbefore referred to and copies will be produced, if required. The said cargo of the respondents impleaded sustained damage as a result of the collision and the remaining value thereof was subjected to liability to contribute in general average to salvage and other expenses incurred by reason of the collision. Upon arrival of the S. S. "Nathaniel Bacon" at a pier in New York Harbor for the discharge of cargo 219
following the aforesaid collision, the aforesaid cargo, in damaged condition as a result of the collision, was delivered to the aforesaid respondents impleaded, respectively, upon delivery to the United States of America, as carrier, by the respondents impleaded of the original bills of lading, and general average bonds, secured by underwriters' guarantees, by the terms of which respondents impleaded agreed to pay the proper proportions of general average charges shown by a proper statement to be due in respect of the cargo owned by and delivered to them respectively as aforesaid. Said respective con-

220 signees demanded and received delivery of the foregoing cargo under the said bills of lading.

4. The intervening libellants, The Home Insurance Company, a corporation duly organized and existing under the laws of the State of New York, and Insurance Company of North America, a corporation organized and existing under the laws of the State of Pennsylvania, intervening libellants in this case, insured the aforesaid cargo of the respondent impleaded Farr Sugar Corporation, and have paid to Farr Sugar Corporation the amount of its loss by reason of damage to said cargo resulting from the col-
221 lision, and pursuant to their underwriters' guarantees given as hereinbefore referred to have paid on behalf of Farr Sugar Corporation the proper proportion of general average charges shown by a proper statement to be due in respect of said cargo. By reason of such payments said intervening libellants, The Home Insurance Company and Insurance Company of North America, have become and are subrogated to the rights of Farr Sugar Corporation to recover from the M. V. "Esso Belgium" damages by reason of such loss and contribution to general average charges by reason of the said collision.

222 5. The intervening libellant, The Home Insurance Company, a corporation duly organized and existing under the laws of the State of New York, insured the aforesaid cargo of the respondent impleaded American Spirits, Inc. and has paid to American Spirits, Inc. the amount of its loss by reason of damages to said cargo resulting from the collision, and pursuant to its underwriters' guarantee given as hereinbefore referred to has paid on behalf of American Spirits, Inc. the proper proportion of general average charges shown by a proper statement to be due in respect of said cargo. By reason of such payments said intervening libellant, The Home Insurance Company, has be-

come and is subrogated to the rights of American Spirits, Inc. to recover from the M. V. "Esso Belgium" damages by reason of such loss and contribution to general average charges by reason of the said collision. 224

6. By reason of the aforesaid collision, the intervening libellants, The Home Insurance Company and Insurance Company of North America, as subrogees to the rights of Farr Sugar Corporation, are entitled to recover and to have a decree against the M. V. "Esso Belgium", her claimant and stipulators, for 100% of the provable damages of Farr Sugar Corporation, including physical damage and general average contributions, excluding interest, which by agreement is not recoverable on the damages, except as from the date of entry of the final decree. 223

7. By reason of the aforesaid collision, the intervening libellant, The Home Insurance Company, as subrogee to the rights of American Spirits, Inc., is entitled to recover and to have a decree against the M. V. "Esso Belgium", her claimant and stipulators, for 100% of the provable damages of American Spirits, Inc., including physical damage and general average contributions, excluding interest, which by agreement is not payable on the damages, except as from the date of entry of the final decree. 225

8. Upon payment of the liability of the M. V. "Esso Belgium" to The Home Insurance Company and Insurance Company of North America, as set forth in paragraph 6 hereof, and payment of the liability of M. V. "Esso Belgium" to The Home Insurance Company, as set forth in paragraph 7 hereof, Belgian Overseas Transport, S. A., claimant and owner of the M. V. "Esso Belgium" is entitled to set off, recoup or recover against the United States of America, as owner of the S. S. "Nathaniel Bacon", in the settlement of liability for collision dam-

226 ages resulting from the aforesaid collision, the sums of $15,981.18 and $287.68, respectively, by reason of such payments.

9. Petitioner, United States of America, as carrier, by its impleading petition demands of Farr Sugar Corporation and American Spirits, Inc., indemnity against its said loss, damage, and liability to M. V. "Esso Belgium" or her owner, consisting of the said sums of $15,981.18 and $287.68, respectively, as hereinbefore set forth, by virtue of the provisions of paragraph 9 of the bills of lading set forth in paragraph Seventh of its impleading
227 petition, which reads as follows:

> "9. If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners
> 228 of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier.
>
> The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact."

10. The respondents impleaded, Farr Sugar Corporation and American Spirits, Inc., deny that they are under

any liability to indemnify the petitioner, United States 229
of America, against liability to the M. V. "Esso Belgium" or her owner, as demanded in the petition (See Answer, Paragraph Eighth), and further allege that the provisions of paragraph 9 of the bills of lading on which the petitioner's demand is based, are invalid, illegal, contrary to the Statutes of the United States, and contrary to public policy, and therefore void and of no legal effect.

11. At all times during the voyage on which the collision occurred the S. S. "Nathaniel Bacon" was owned by the United States of America (War Shipping Administration) and operated by the War Shipping Administration, 230
which, with respect to the operation thereof on the voyage in question, was engaged as a common carrier in the commercial carriage of merchandise by sea for hire. The bills of lading referred to herein were issued and delivered to the shippers by New York and Porto Rico Steamship Company as agent of, and for account of War Shipping Administration, as such carrier aforesaid.

12. The rights of the other insurance companies who have intervened as libellants are similar to those of The Home Insurance Company and Insurance Company of 231
North America as set forth above with respect to the cargo which they respectively insured, and the claim of the United States against the assureds of said companies is similarly for indemnity with respect to the amounts set off, recouped or recovered by the owner of the M. V. "Esso Belgium" against the United States of America by reason of the recoveries of said insurance companies against the M. V. "Esso Belgium"; and it has been agreed between the parties that the disposition of the claim of the United States against the respondents impleaded Farr Sugar Corporation and American Spirits, Inc., as

232 hereinbefore set forth, will control the claims of the United States against the assureds of such other intervening libellants as the same may be applicable.

13. Since it is contemplated that the rights of all parties to this litigation will be disposed of in a single decree, and all issues have been disposed of by agreement except the issue between the United States of America, petitioner, and respondents impleaded referred to above, the parties hereto respectfully request the Court to adjudicate this issue.

233 Dated: Feb. 1, 1947.

(Signed) JOHN F. X. McGOHEY,
U. S. Attorney,
By VINCENT A. CATOGGIO,
Spec. Ass't.,
Proctors for Libellant and Petitioner,
United States of America.

(Signed) KIRLIN, CAMPBELL, HICKOX & KEATING,
Proctors for M. V. "Esso Belgium."

234

(Signed) BIGHAM, ENGLAR, JONES & HOUSTON,
Proctors for Intervening Petitioners, Atlantic Mutual Insurance Company, et al. and respondents-impleaded, Farr Sugar Corporation and American Spirits, Inc., et al.

Testimony.

235

[SAME TITLE.]

New York, December 21, 1948, 2:30 P. M.

Before—Hon. Harold R. Medina, *D. J.*

Appearances:

John F. X. McGohey, Esq., United States Attorney,
Proctor for United States of America 236
and

Burlingham, Veeder, Clark & Hupper, Esqs.,
Edward L. Smith, Esq., Special Assistant to the Attorney General,
John Galey, Esq., of Counsel.

Bigham, Englar, Jones & Houston, Esqs.,
Proctors for Intervenors,
Leonard J. Matteson, Esq., and
Richard F. Shaw, Esq., of Counsel.

Kirlin, Campbell, Hickox & Keating, Esqs., 237
Proctors for Respondents,
Cletus Keating, Esq.,
Edward S. Murphy, Esq., and
Louis J. Gusmano, Esq., of Counsel.

The Court: Gentlemen, before we start there is one thing I seem to have to put in these cases, and I want to get straightened out. I noticed in looking over the file here that perhaps in some way or another these insurance companies—I think I have a hundred shares of stock in the Fidelity. I cannot even remember the name of it now. Is it Fidelity Phenix?

238 Mr. Keating: It could not possibly make any difference.

The Court: Fidelity Phenix, and I don't know how far that may be involved in the matter. I want to say that. I cannot think of anybody else connected with it that I have anything to do with, so I state that fact. If you gentlemen think that I ought not to hear the case, or if you think you should explain what bearing that company has on it, I will be very glad to disqualify myself.

Mr. Keating: I should think it made absolutely no difference one way or the other.

Mr. Galey: I agree with that, if the Court please.

239 The Court: I hope I don't discover any others here because I haven't been through all the papers. I notice there is this Insurance Company of North America in there. I had two or three cases for them when I was at the bar, but, goodness, I cannot imagine that that has any bearing on the case at all.

You may go right ahead and make such opening statements as you care to so that I may be further advised what I have to decide.

Mr. Smith: If your Honor please, these proceedings arise out of a collision between a Government-owned ship, the "Nathaniel Bacon", and a ship owned by Belgian 240 Overseas Transport, the "Esso Belgium".

The proctors have agreed as of a considerable time ago that the collision was both to blame. We did have a slight difference in the distribution of damages, which was intended to discount the possibilities of a trial, but we are in essential agreement as to both to blame for the collision, and most of the damages have been adjusted, and a stipulation will be put in evidence which states the percentage of the total damages which each ship is to bear.

I represent the Government, and about the only question which has not been disposed of by agreement is the question of the Government ship's liability to its own

cargo, and the reason that that question has not been 241
disposed of is because the cargo was moving under a bill of lading which contains a so-called both to blame collision clause.

That clause provides, in effect, that the cargo shall pay the carrying ship any amounts which the carrying ship is obliged to pay any other ship on account of liability for damage to it.

The Court: Is that paragraph the one that appears on page 6 of the stipulation dated February 1, 1947?

I wonder if you might pause just a moment until I read that? I had started reading the stipulation but had not 242
quite got down to that clause, and I think if I read it to myself before you proceed, it will help me a little bit.

(A pause.)

The Court: The net result of that seems to be that the owners of the cargo or the subrogees of the owners of the cargo would be without remedy.

Mr. Smith: The cargo would bear the ship's proportionate liability and could only collect what could be collected from the other vessel in the event of a both to blame collision.

But if I may continue, perhaps.

The Court: Yes, do so. 243

Mr. Smith: The Government in its case happens to have what amounts to a cost plus insurance against liabilities of this sort, cargo damage, and personal injury and life, and that insurance entitles us to the benefit of very eminent counsel with respect to that aspect of the case, Mr. Galey here.

My interest is solely to see to it that the stipulation, in so far as it affects the other liabilities, about which we are in substantial agreement, and about which I don't think your Honor will be concerned, is in proper order, and that the decree properly recites the agreement with respect to those matters, and to participate as a matter

244 of interest in this very interesting question of the validity of a both to blame collision clause, but the Government proposes to leave to its counsel the question of determining that issue which bears upon its liability in the Government underwriting.

Mr. Murphy: If the Court please, I represent Mr. Keating and I represent the "Esso Belgium", the other side of the collision case. There is only one detail to be added to what Mr. Smith has just told your Honor, and that is the formal stipulation which is not included in this long stipulation your Honor has looked at. We all stipulate that ownership of both vessels is as alleged in
245 the pleadings. So that that detail is covered.

After that your Honor will hear argument on the both to blame clause.

The parties in this case come to your Honor for an interlocutory decree in the usual form of a collision case, on the libel and cross-libel, after your Honor has determined the major point of law under the both to blame clause.

Mr. Galey: If the Court please, I think it might be helpful if I stated to you very briefly what the pleadings are.

246 This collision took place in New York Harbor in November, 1942. The "Nathaniel Bacon", owned by the United States, was inbound from Puerto Rican ports with a cargo. She was struck by the "Esso Belgium" and she had to be beached on Red Hook Flats, and as a result of that casualty, considerable damage was sustained by the cargo of the "Bacon" and general average disbursements were incurred in minimizing or lessening the damage.

After the collision a libel was filed by the United States against the "Esso Belgium" for the damages of the "Nathaniel Bacon". A cross-libel was promptly filed by the owners of the "Esso Belgium" for the damage sustained by the "Esso Belgium".

247

The next step was a petition for intervention by the underwriters, the insurers of the cargo on the "Nathaniel Bacon", who had paid or had become liable for the losses sustained by the cargo. Under that petition the various underwriters sought to become co-libelants against the "Esso Belgium" and her owners.

The next step was the filing of a petition by the United States, as cross-respondent under the cross-libel.

As it appeared to be a case where both ships might be to blame, the United States impleaded her own cargo under this cross-liability clause or this both to blame clause.

248

The Court: Would you pause just a moment there to let me straighten this out? There seems to be two cases here, A. 126-101 and A. 126-167. A. 126-101, the file of that case has in it all the pleadings that you have just referred except that I do not identify the last one, and I want to just glance through here and have it before me.

Mr. Galey: See if that has a number. The impleading petition, I think, is No. A. 126-167.

The Court: Oh, well, then that is the reason I have that little confusion. This last step is given a separate number.

249

Mr. Galey: Yes, apparently.

The Court: Let me look in the other file.

Mr. Galey: Oh, I see, one is the libel, you see. 126-101 was the Government's libel against the "Esso Belgium". Then when the cross-libel was filed, it was given a separate number, A. 126-167, and this impleading petition was filed under the cross-libel. So that, although the two proceedings are tried together, the two cases, and although they are to be dealt with in a single decree, they do have two numbers in the files because the libels were filed at different times?

The Court: Yes. Have they been consolidated?

250 Mr. Galey: I don't think so. I don't believe we usually do that in admiralty. We just try the cases together and dispose of them in a single decree.

The Court: Very well. Let me just straighten myself out with this. 126-167; I find the paper that you describe as the cross-libel.

Mr. Galey: Entitled Belgian Overseas vs. the United States.

The Court: The relief that is prayed for there——

Mr. Galey: Is merely for the collision damage sustained by the "Esso Belgium".

The Court: Yes—sustained, rather, by the other vessel,
251 the "Nathaniel Bacon".

Mr. Galey: No, in the cross-libel. You see, the Belgian Overseas Transport was the owner of the "Esso Belgium".

The Court: Oh, yes, the cross-libel is the cross-libel of the Belgian—— .

Mr. Galey: Overseas Transport, which was the owner of the "Esso Belgium". That seeks to recover any damages which it may suffer through the collision from the United States, the owner of the "Nathaniel Bacon".

The Court: Yes, and then the next step is the petition of the United States as owner of the "Nathaniel Bacon",
252 which is called impleading petition.

Mr. Galey: Yes, it impleads the owners of its cargo as respondent. You see, as a respondent——

The Court: Yes.

Mr. Galey: (Continuing) —it may become liable to Belgian Overseas, and it impleads its own cargo in order to recover from its cargo such part of the recovery that Belgian has——

The Court: I have it. Let me read to myself the prayer for relief in this impleading petition of the United States of America as owner of the "Nathaniel Bacon".

(A pause.)

The Court: Very well.

Mr. Galey: Of course, the basis of the impleader is 253
the clause which we are submitting to your Honor, the both to blame collision clause.

In order to be as clear as I can on how this clause originated, how it came about, and its purpose, I have to go back a little bit.

(Discussion with respect to the both to blame collision clause not transcribed.)

The Court: We are going to recess now until tomorrow morning at 10:30.

(Adjourned to December 22, 1948, at 10:30 a. m.)

254

New York, December 22, 1948,
10:30 o'clock a. m.

Trial resumed.

(Discussion with respect to the both to blame collision clause not transcribed.)

The Court: We are going to have the record show an adjournment to January 3rd, but I will have my secretary inform you of the actual date when we may continue.

255

New York, January 11, 1949,
2:30 o'clock p. m.

Trial resumed.

(Discussion with respect to the both to blame collision clause not transcribed.)

The Court: That is where we are going to stop. We will go on from there tomorrow morning.

(Adjourned to 10:30 A. M., January 12, 1949.)

New York, January 12, 1949,
256 10:30 o'clock a. m.

Trial resumed.

(Discussion with respect to the both to blame collision clause not transcribed.)

The Court: You have some proof to put in here, gentlemen, as I understand it, and I think we will take a short recess while you get your stipulations, and whatever it is you desire to put in, ready, and then we will conclude the case.

(Short recess.)

257 Mr. Galey: I would like to offer in evidence the stipulation as to facts.

(Marked Libelant's Exhibit 1.)

Mr. Galey: Mr. Matteson and I have agreed with respect to the proof of foreign law, if necessary, in substance, to apply Section 344(a) of the code—perhaps I should read his letter so that we will have the stipulation as it is.

The Court: I think if you merely offer the paper in evidence with your preliminary statement, it may suffice,
258 but do it your way.

Mr. Galey: The letter contains some other things. The stipulation is embodied in only one paragraph.

The Court: Very well.

Mr. Galey: The stipulation is as follows:

With respect to the foreign law, particularly English, with respect to collision liability on the carriage of goods by sea, we agree with you that it will be desirable and proper for both sides to be able to refer to British cases, or pages from standard British textbooks on the subject.

We are entirely agreeable to stipulating that either party 259
or the Court may refer to the opinions of British courts, or to the textbooks, or statutes in proof of British or other foreign law so far as the same may be pertinent to the consideration of this case.

I understand that applies not only in the District Court but on appeal.

Mr. Matteson: Of course.

Mr. Galey: There was a general average adjustment prepared in this case. I don't want to burden the record with the adjustment. The only purpose of offering it would be to show, in this particular case, where general 260
average contributions form a part of the amount in litigation, the sacrifices and the expenses of the ship exceed the expenses and sacrifices of the cargo, so there would have been a balance to the ship. I understand that is conceded, Mr. Matteson?

Mr. Matteson: That is correct. Of course, there were sacrifices and expenses on both sides, your Honor, the subject of distribution in general average.

The Court: Very well.

Mr. Galey: But the amount of the ship's sacrifices was greater than the cargo's.

I offer in evidence the record of the hearings before 261
the Committee on Commerce of the Senate on Bill S-1152, which was the bill relating to the carriage of goods by sea.

The Court: Of the Senate?

Mr. Galey: This is the Senate. These are the hearings before the Senate. I assume your Honor would like to have me offer the whole pamphlet in evidence.

The Court: I think so. I think I would find it helpful.

(Marked Libelant's Exhibit 2.)

Mr. Galey: I offer in evidence the report of that committee after the conclusion of the hearings.

(Marked Libelant's Exhibit 3.)

262 Mr. Galey: I offer a pamphlet containing the report of the hearings before the Committee on Merchant Marine and Fisheries of the House of Representatives on the same bill before which the same proposed amendments with respect to the both to blame collision clause were proposed.

(Marked Libelant's Exhibit 4.)

Mr. Galey: I offer the report of the Committee on Merchant Marine and Fisheries rendered after the hearings with respect to the same bill.

263

(Marked Libelant's Exhibit 5.)

Mr. Galey: I should like to offer also the report of the delegates of the United States to the International Conference on Maritime Law, at which the Hague Rules were first considered.

Mr. Matteson: Are you offering the document or a photostat?

Mr. Galey: I am offering a photostat, not the original document.

264 (Marked Libelant's Exhibit 6.)

Mr. Galey: I should also like to offer Senate Executive Report No. 2, approving the International Convention for the Unification of Rules relating to bills of lading, which contains some comment, which I think your Honor will find useful, on the history of this matter.

The Court: What was it they approved?

Mr. Galey: The convention.

The Court: Not the Hague Rules?

Mr. Galey: It is the Hague Rules Convention on which——

The Court: That is all I need. Just for my notes. 265

(Marked Libelant's Exhibit 7.)

Mr. Galey: I also offer the Congressional Record, or a portion of it, covering the date April 1, 1935, Proceedings in the Senate, at which the convention was approved by the Senate.

(Marked Libelant's Exhibit 8.)

The Court: I thought the Senate refused to approve?

Mr. Matteson: This is the Hague Rules Convention.

The Court: This is not this 1922 affair?

Mr. Galey: This is the 1922 affair, not the 1910 affair. 266

The Court: What was it Mr. Matteson was telling was so significant about something not submitted to the Senate until, as he put it, 1937?

Mr. Matteson: That was the Collision Convention of 1910.

The Court: Oh, that is the Collision Convention of 1910. Well, I had a feeling I had something mixed up there because those dates did not fit in. All right.

Mr. Galey: I also offer the statement in tabular form from Mr. Knauth's book, which we have both agreed on as stating the ratifications and adherences to the convention with respect to the Hague Rules and cargo liability. 267

(Marked Libelant's Exhibit 9.)

Mr. Galey: Since the Brussels Convention has been mentioned, I offer certain pages from the work of Mr. Benedict on American admiralty, which indicates what that document is. That has been referred to in the document and this will indicate what it is and the extent of the adherences to it and ratifications.

(Marked Libelant's Exhibit 10.)

268 Mr. Matteson: That is No. 10 in your list isn't it?

Mr. Galey: I don't know whether that is—no, no, that is not. It may have been; I don't know what the numbers were.

Mr. Matteson: May I see the document?

Mr. Galey: Yes, it is one that I think was——

Mr. Matteson: Yes, that is right.

Mr. Keating: Collision?

Mr. Matteson: Yes.

Mr. Galey: I think, for your Honor's convenience, perhaps I had better offer in this short form the British
269 Carriage By Seas Act because that has been referred hereto. It will save your Honor looking in the books for it.

(Marked Libelant's Exhibit 11.)

Mr. Galey: And the Canadian Water Carriage Goods Act, 1936, I offer that.

(Marked Libelant's Exhibit 12.)

Mr. Galey: I think that completes our proof—oh, yes,
270 there is one other matter that I should like to put in and that is page 319 and the following pages of the Bulletin No. 65 of the International Committee Gottenborg Conference, which contains in convenient form the original Hague Rules, with the showing of the subsequent amendments to those rules at each of the conferences that have been referred to, and the convention as finally adopted. The changes are indicated in red and blue in the document so they will be easy to identify.

(Marked Libelant's Exhibit 13.)

Mr. Matteson: If your Honor please, Mr. Galey, in advance of the trial, furnished me a list of some seventeen

documents that I understood he was offering. Some of 271
them he has not offered and, since he has not, I want to offer them, and I have one or two additions.

The first one is photostatic excerpts from the hearings of the subcommittee on Foreign Relations of the United States Senate, 75th Congress, relating to the Collision Convention of 1910, hearings in 1938.

The Court: What is the paper designated?

Mr. Matteson: It is designated Hearings before subcommittee of Committee on Foreign Relations of the Senate. The title is a long one.

The Court: I don't need any more.

Mr. Matteson: It is the Brussels Convention, 1910. 272

Mr. Galey: I think that is already in evidence.

Mr. Matteson: I missed it. It was among the things you intended to offer but I don't think you did.

Mr. Galey: Yes, I offered the convention.

Mr. Matteson: Yes, but not the hearings before the Senate Committee.

Mr. Galey: No.

The Court: That is the Senate Committee on Foreign Relations, isn't it?

Mr. Keating: That is right.

The Court: I don't think that has been offered.

There have been the Committee on Commerce and the 273
Committee on Merchant Marine and Fisheries of the House.

Mr. Matteson: I am sure——

The Court: I don't think that was offered.

Mr. Matteson: (Continuing)—this was not offered. I would like to offer that in two parts, if I may, because the first part is excerpts which were supplied me by Mr. Galey, and the second part consists of additional excerpts that I had myself selected from the record.

The Court: Mr. Galey's selections will go in as A and your selections will go in as B.

274 Mr. Matteson: Mr. Galey, would you have any objection to supplying the Court with a copy, because the only copy I have is the copy you supplied me?

Mr. Galey: I have only the parts that I offered, and those were the parts which contained the convention, which I have already offered in evidence, and the statement of ratifications, pages 1 to 13. I don't know what parts you want to offer, whether you want to hand this up to the Court——

The Court: Mr. Matteson has in his hands two photostatic pamphlets, one of which he desires to have considered separately from the other, and his trouble is
275 that he will not have a copy of one of them for himself if he marks the one he holds in his hand in evidence.

Mr. Galey: I will see that he gets this and he can make a copy for himself.

The Court: And he can offer the ones he has in his hand in evidence. The first one represents excerpts selected by Mr. Galey, and that will go in as Exhibit A, and the second one, which represents excerpts selected by Mr. Matteson, will go in as Exhibit B, and then everybody will be happy in anticipation of the fact that Mr. Matteson will receive another copy so that
276 he can work on that when he is getting up his brief.

(Marked Intervenors' Exhibits A and B.)

Mr. Galey: May I know what pages you are offering?

Mr. Matteson: Yes, I will furnish you copies. I am just making a note of the page numbers that refer to your copy. Here is A and here is B, and I will give this copy to Mr. Keating and Mr. Galey.

The second thing is a photostatic excerpt from the Maritime Law Committee of the International Law Association, containing the text of the Hague Rules, 1922, as amended at the London Conference.

Mr. Galey: That is the document I handed up to your 277
Honor in the course of my argument.

Mr. Matteson: And I will have my copy marked and will you supply me with another one of those?

Mr. Galey: Those are already in evidence in these Gottenborg Rules which I offered.

Mr. Matteson: They are in slightly different form and, actually, I think this is very much more convenient.

The Court: Mr. Matteson has marked up this one in different colored pencil.

Mr. Matteson: Mr. Galey did it.

The Court: That is all right. I have no objection 278
at all. I appreciate the reason why so many lawyers raise a terrible hullabaloo if somebody marks something. I find it very helpful if a man will mark parts he wants to draw to my attention.

Mr. Galey: Those marks were taken in the same colors from the original document. The photostat did not reproduce the colors of the original markings.

The Court: I see. I did not know what the significance of the colors was.

(Discussion off the record.)

(Marked Intervenors' Exhibit C.) 279

Mr. Matteson: The next thing is a copy of the Merchant Shipping Act of 1911.

Mr. Galey: Is that the Maritime Conventions Act?

Mr. Matteson: Maritime Conventions Act.

(Marked Intervenors' Exhibit D.)

Mr. Matteson: That is taken from McLaughlin's Law of Merchant Shipping.

The next thing is a photostatic excerpt from the proceedings of the Maritime Law Committee at The Hague

280 in 1921, pages 31 to 34 inclusive, to which I referred in my argument, and they are taken from a volume which belongs to the library of Columbia Law School and, consequently, I am not able to furnish that.

(Marked Intervenors' Exhibit E.)

Mr. Galey: What is the number of that bulletin?

Mr. Matteson: It does not seem to have a bulletin number, but the outside of the volume says "30th Report, Hague."

Mr. Galey: I haven't seen this document before but I assume—

281 Mr. Matteson: I have the volume temporarily here for your inspection.

Mr. Galey: If there is anything we haven't put in that we would like to put in, I suppose we would have the opportunity to do it after we have examined it?

Mr. Matteson: That is agreeable to me.

The Court: You had better go ahead and put in what you want, and we won't have any blanketing that will leave everything in confusion; but if anybody has something that, before briefs come in, he is desirous of adding, he may apply for leave to do that and I have no doubt

282 that I will give him leave.

Mr. Matteson: I suppose all these documents do come within the stipulation we made at the outset, and they can be referred to by counsel or the Court, but it will be very convenient to have them in the record.

The Court: Concerning this paper, you started to say "30th Report," and I like to put down in my notes a brief but accurate description of each exhibit.

Mr. Matteson: It is Report of the 30th Conference, International Law Association, Volume II. It is the proceedings of the Maritime Law Committee relating to the adoption of the Hague Rules, 1921.

(Marked Intervenors' Exhibit F.)

283

The Court: When you say, "International Maritime Committee" and then you say "Maritime Law Committee," do you mean the same thing?

Mr. Matteson: Yes.

(Discussion off the record.)

Mr. Galey: With respect to this last exhibit which was offered——

The Court: Bulletin 27?

Mr. Galey: Yes, it consists of certain excerpts from this bulletin, beginning at page 476. If this is to be offered, I should like to offer certain other pages which relate to the same subject matter, and how your Honor 284 wants those to be offered or how do you want them to go in, I don't know, but I have the document here and I can indicate the pages, I have them marked now, or they can be marked later in rebuttal, in which case they will be separated from the exhibit itself.

The Court: I really think it will be easier if you will put them in in rebuttal, having already indicated on the record the relationship.

Mr. Matteson: Would you mind indicating to me the pages that you have in mind, which you propose to refer to?

Mr. Galey: Pages 447, 456 to 458 inclusive, and page 285 475, which just precedes the first page of the respondents' exhibit.

Mr. Matteson: Does that cover it?

Mr. Galey: Yes.

Mr. Matteson: I simply want to be able to make photostats before I send the volume back to Columbia Law Association.

The Court: Do you desire to add those to Exhibit F?

Mr. Matteson: I will be pleased to do that.

Mr. Galey: Yes, I think so.

286 The Court: So you may have the photostats of those pages made and physically add them. If the exhibits are up in my chambers, why, you may just add them there; or if they are down here with the Clerk, do it here, wherever they are.

Mr. Matteson: I will have the photostats of the additional pages made in the next day or two and have somebody come up to your chambers and hand them to you.

The Court: Both sides rest?

Mr. Galey: Rest.

287 The Court: What did we fix about the time for briefs? The date of the original briefs was February 10th, was it?

Mr. Keating: The 10th, I suggested, sir.

The Court: And you suggested some date in April?

Mr. Keating: April 1st.

The Court: All right, all briefs to be in four p. m., April 1st.

Libelant's Exhibit 1.

288 Identical with Stipulation of Facts, printed herein at pages 71 to 78.

Libelant's Exhibit 2.

Record on the hearings before the Committee of Commerce of the Senate on Bill S-1152.

(Omitted pursuant to stipulation.)

Libelant's Exhibit 3.

289

Report of Committee of Commerce of the Senate after hearings.

(Omitted pursuant to stipulation.)

Libelant's Exhibit 4.

Report of the hearings before the Committee on Merchant Marine and Fisheries of the House of Representatives. 290

(Omitted pursuant to stipulation.)

Libelant's Exhibit 5.

Report of the Committee of the Merchant Marine and Fisheries after hearings.

(Omitted pursuant to stipulation.) 291

Libelant's Exhibit 6.

Report of the delegates of the United States to the International Conference on Maritime Law.

(Omitted pursuant to stipulation.)

Libelant's Exhibit 7.

292 Senate Executive Report No. 2, approving the International Convention for the Unification of Rules relating to bills of lading.

(Omitted pursuant to stipulation.)

Libelant's Exhibit 8.

293 Portion of Congressional Record covering the date April 1, 1935, Proceedings in the Senate.

(Omitted pursuant to stipulation.)

Libelant's Exhibit 9.

Statement in tabular form from Mr. Knauth's book as to ratifications and adherences to the convention with respect to the Hague Rules and cargo liability.

294

(Omitted pursuant to stipulation.)

Libelant's Exhibit 10.

Portions of Mr. Benedict's work on American Admiralty.

(Omitted pursuant to stipulation.)

Libelant's Exhibit 11.

295

British Carriage By Seas Act in short form.

(Omitted pursuant to stipulation.)

Libelant's Exhibit 12.

Canadian Water Carriage Goods Act, 1936.

(Omitted pursuant to stipulation.)

296

Libelant's Exhibit 13.

Page 319, et seq., of Bulletin No. 65 of the International Committee Gottenborg Conference.

(Omitted pursuant to stipulation.)

297

Intervenors' Exhibits A and B.

Excerpts from the hearings of the subcommittee on Foreign Relations of the United States Senate, 75th Congress, relating to the Collision Convention of 1910, hearings in 1938.

(Omitted pursuant to stipulation.)

Intervenors' Exhibit C.

298

Excerpt from the Maritime Law Committee of the International Law Association, containing the text of the Hague Rules, 1922, as amended at the London Conference.

(Omitted pursuant to stipulation.)

Intervenors' Exhibit D.

299

Merchant Shipping Act of 1911.

(Omitted pursuant to stipulation.)

Intervenors' Exhibit E.

Excerpt from the proceedings of the Maritime Law Committee at The Hague in 1921, pages 31 to 34 inclusive.

(Omitted pursuant to stipulation.)

300

Intervenors' Exhibit F.

Report of the 30th Conference, International Law Association, Volume II.

(Omitted pursuant to stipulation.)

301

[SAME TITLE.]

APPEARANCES:

JOHN F. X. MCGOHEY
United States Attorney
(Edward L. Smith, Special Assistant to the Attorney General, Advocate)
New York, N. Y.

and

302

BURLINGHAM, VEEDER, CLARK & HUPPER
(Chauncey I. Clark
Ray Rood Allen and
Benjamin E. Haller, Advocates)
New York, N. Y.
Proctors for Libellant in No. A126-101
Proctors for Respondent in No. A126-167

BIGHAM, ENGLAR, JONES & HOUSTON
(Leonard J. Matteson and
Richard F. Shaw, Advocates)
New York, N. Y.
Proctors for Intervenors in No. A126-101
Proctors for Farr Sugar Corporation, et al.
Impleaded in No. A126-167

303

KIRLIN, CAMPBELL, HICKOX & KEATING
(Cletus Keating
Edwin S. Murphy and
Louis J. Gusmano, Advocates)
New York, N. Y.
Proctors for Respondent in No. A-126-101
Proctors for Libellant in No. A126-167

MEDINA, *D. J.*

This litigation arises out of a collision which occurred in New York Harbor on November 24, 1942, between the

304 S.S. "Nathaniel Bacon" and the M/V "Esso Belgium." As a result of the collision both the vessels and the cargo aboard the "Nathaniel Bacon" sustained damage.

The first action was instituted by libellant United States of America, as owner of the "Nathaniel Bacon" and as bailee of her cargo, against the "Esso Belgium" seeking to recover for the damage done to the "Nathaniel Bacon" and to her cargo. Certain insurance companies which had paid the cargo owners their losses intervened as libellants to assert the subrogated rights of the cargo owners against the "Esso Belgium."

The second action is a cross-libel filed by the owner of
305 the "Esso Belgium" seeking to recover from the United States as owner of the "Nathaniel Bacon" for the damage suffered by the "Esso Belgium," including the amount it might be held liable to pay for damage to the cargo aboard the "Nathaniel Bacon." The United States then impleaded the owners of the cargo aboard the "Nathaniel Bacon," only two of whom have appeared, seeking indemnity from them pursuant to the provisions of the so-called "Both-to-Blame" clause contained in the bills of lading issued by the "Nathaniel Bacon" to them. The clause is commonly used in ocean carriers' bills of lading
306 and was designed to correct a curious anomaly resulting from the inter-relation of certain rules of Admiralty Law.

By virtue of the provisions of §3 of the Harter Act, 46 U. S. C. A. §192 (1928), and §4 (2)(a) of the Carriage of Goods by Sea Act, 46 U. S. C. A. §1304 (1944), the carrier is not liable to the owner of cargo laden aboard her for damage to cargo resulting from negligence of the carrier's servants in the management of the ship. The risk of loss due to such damage must be borne by the cargo owner. However, if the damage to cargo results from the concurrent negligence in navigation of the carrier and of some other ship, that is where two

ships are to blame, the owner of the cargo may recover 307
his entire damages from the other ship. *The New York*, 175 U. S. 187 (1899); *The Atlas*, 93 U. S. 302 (1876); see *The Chattahoochee*, 173 U. S. 540, 549 (1899).

In addition, each ship has a right of action against the other in admiralty for negligence. In such an action the damages suffered by the two ships are equalized. Each ship is liable for one-half of the total damages: a balance is struck by requiring the ship suffering the least damages to pay to the other ship one-half the difference between the amount of its damages and the amount of the other ship's damages. In striking this 308
balance, the amount paid by the non-carrying vessel to the owners of the cargo aboard the carrier is included as part of the non-carrier's damages. *Erie Railroad Co.* v. *Erie & Western Transportation Co.*, 204 U. S. 220 (1907); *The Chattahoochee, supra.*

The carrier is thus indirectly liable for one-half of the damage suffered by the cargo owners as a result of the negligence of the carrier's servants in the navigation of the ship, despite the immunities of §3 of the Harter Act and §4 (2)(a) of the Carriage of Goods by Sea Act, supra, but *only* when the carrier is *partly* to blame for the damage. When the carrier is entirely to blame then, with 309
respect to damage to cargo, the carrier, by virtue of the statutory provisions above referred to, need pay nothing at all.

To correct this anomalous result, the Both-to-Blame clause provides, in substance, that in a both-to-blame collision, the owners of the goods will indemnify the carrier against all loss or liability to the other ship, in so far as such loss or liability represents loss of, or damage to, or any claim of the cargo owners, paid to them by the other ship, and set-off, recouped or recovered by the other

310 ship's owners as part of her claim against the carrier. The clause is set forth verbatim in the footnote.*

This is the first time that the question of the validity of the contractual provision in its present form has been before the courts. One case, *The W. W. Bruce*, 14 F. Supp. 894 (E. D. N. Y., 1936), sustained the validity of an earlier version of the clause, but was reversed on other grounds, 94 F. 2d 834 (2d Cir. 1938).

The parties have stipulated that the collision occurred "by reason of negligence and fault in navigation on the part of both vessels," and without "the act, fault, or neglect of the shipper, consignees, owners or insurers of
311 the cargo." It is also stipulated that the decision as to the two impleaded cargo owners who have appeared will be determinative of the issue as to the other cargo owners.

Finally, it is stipulated that the intervening insurance companies are entitled to recover 100% of the provable damage of their assureds from the "Esso Belgium" and that the "Esso Belgium" is entitled to include in its claim against the "Nathaniel Bacon" the amounts of $15,981.18 and $287.68 for which it is liable to the intervening in-

---

312 * If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier.

The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact.

surers. The only issue is whether the United States, as 313
owner of the "Nathaniel Bacon," is entitled to indemnity from the two impleaded cargo owners. Those two owners deny liability to indemnify on the ground that the provisions of the Both-to-Blame clause are "invalid, illegal, contrary to the statutes of the United States and contrary to public policy, and are therefore void."

The validity of the clause is thus squarely in issue.

Despite the maze of intricate and complicated arguments pro and con, which have covered a wide area and a multiplicity of details too numerous for specific reference, the basic problem is a simple one and in its solution 314
will be found an underlying principle which governs the determination of the host of subordinate questions. Prior to the Harter Act it was settled American law that any agreement absolving the shipowner from liability for negligent navigation or negligence in the management and operation of the vessel was void as against public policy. *Liverpool Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397 (1889); *Railway Co.* v. *Stevens*, 95 U. S. 655 (1877); *Railroad Co.* v. *Pratt*, 22 Wall. 123 (1874). This public policy was changed by §3 of the Harter Act, to the effect that, providing there was "due diligence to make the said vessel in all respects seaworthy and properly manned, 315
equipped, and supplied, neither the vessel, her owner, or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel." While the language of §4 (2)(a) of the later and here controlling Carriage of Goods by Sea Act eliminated the prerequisite of due diligence to make the vessel in all respects seaworthy and substituted language which exonerated the shipowner from responsibility unless it failed to use diligence to make the vessel seaworthy in some respect proximately causing or contributing to the loss, Knauth, The American Law of Ocean Bills of Lading 135

316 (3d ed. 1947), the change of public policy proclaimed by the Harter Act was continued. As the shipowner was thus relieved of liability to the cargo owner for negligent navigation, and irrespective of whether this be termed an "exemption" or an "immunity," it seems clear to me that there could no longer continue to be any public policy nullifying an agreement absolving the shipowner from liability for negligent navigation. But that is exactly what the Both-to-Blame clause in substance purports to do.

The Congress having spoken in such unequivocal man-
317 ner in §4 (2)(a), on the fundamental question of non-liability of the shipowner generally for negligent operation, it is natural to expect that nothing to be found in the balance of the statutory scheme shall purport to lay down principles inconsistent with §4 (2)(a) and designed to prevent the shipowner from implementing the public policy thus declared wherever, for procedural or other reasons, the policy of the statute is not self executing. Nor can I, after the most careful and painstaking investigation of the entire matter, find any such inconsistency in the portions of the Carriage of Goods by Sea Act urged upon me by the cargo owners, and discussed below. Ingenious as are
318 some of their arguments, I am unable to find that the Both-to-Blame clause offends any provision of the Carriage of Goods by Sea Act or any existing public policy, nor does it seem to me to be in any way unreasonable.

The bills of lading provide that they are drawn pursuant to the provisions of the Carriage of Goods by Sea Act, supra, a stipulation authorized by the statute. Two specific sections thereof are relied on by the cargo owners as invalidating the clause: §4 (3), and §3 (8). §4 (3) provides:

> The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising

or resulting from any cause without the act, fault, 319
or neglect of the shipper, his agents, or his servants.

It seems clear to me that §4 (3) was never intended to have any application whatever, directly or indirectly, to the general subject of damage to cargo, or to any agreement, such as is contained in the Both-to-Blame clause, indemnifying the carrier against loss or liability representing "loss of, or damage to, or any claim whatsoever of the owners of said goods." A reading of §4 as a whole confirms this view; and it is axiomatic that the various parts of a statute such as the Carriage of Goods by Sea Act must be read together as parts of a composite whole. 320

Moreover, it is significant that when the statute was before the Congress, it was proposed that §4 (3) be amended in such fashion as specifically to invalidate the Both-to-Blame clause. See Hearing Before the Committee on Commerce, United States Senate, 74th Cong., 1st Sess., (1935), pp. 52-59, 61-63; Hearings Before the Committee on Merchant Marine and Fisheries, House of Representatives, 64th Cong., 2d. Sess., (1936) pp. 49-68. That proposal was rejected.

I conclude that reading the statute as a whole and taking into consideration its legislative history, §4 (3) of the 321
Carriage of Goods by Sea Act does not invalidate the Both-to-Blame clause.

§3 (8) is also relied upon by the cargo owners. That section reads:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void

322 and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

Clearly the first sentence prohibits "contracting out" of liability for negligence only if the negligence is in the performance of the duties and obligations provided in §3. §3 imposes no duty or obligation on the carrier in so far as the navigation and management of the ship by its servants is concerned. To the contrary, §4 (2)(a) specifically grants the carrier an immunity from such liability. To construe this section as invalidating "con-
323 tracting out" of negligence generally would be to disregard the plain meaning of the language, other relevant sections of the statute, its legislative history, see Hearings on S. 1152, Committee on Merchant Marine and Fisheries, House of Representatives, 74th Cong., 2d. Sess., p. 11 (1936), and the construction placed on the statute's predecessor section in the Harter Act, see *Calderon* v. *Atlas Steamship Co.*, 170 U. S. 272, 277-78 (1898); *The Irrawaddy*, 171 U. S. 187, 190 (1898); *McNamara & Son* v. *Hatteras*, 38 Ll. L. L. R. 233, 234 (1930).

The second sentence of §3 (8), dealing with benefit of
324 insurance, is no more applicable than the first. The legislative background, see Bulletin No. 57, International Maritime Committee, pp. 474-5 (Antwerp, 1923), and the cases illustrating the evil at which the provision was directed indicate that a benefit of insurance clause is invalid only when it requires the cargo owner to insure himself against a loss resulting from the carrier's failure to perform an essential duty of his employment. *Phoenix Insurance Co.* v. *Erie & Western Transportation Co.*, 117 U. S. 312, 322 (1886); *The Hadji*, 20 Fed. 875 (1884). Since the carrier cannot relieve himself of such liability directly, he cannot do so indirectly by requiring the cargo owner to insure against it.

Similarly, the statute declares that a benefit of insurance shall be deemed to be a clause relieving from liability, but invalidates such clauses only by virtue of the first sentence of §3 (8). I have held above that the Both-to-Blame clause does not run afoul of the rule laid down in that sentence, because it does not deal with the duties and obligations of the carrier provided in §3 of the Act. 325

It follows that neither §4 (3) nor §3 (8) invalidates the contractual provision being considered.

That provision is also attacked on the ground that it relieves the carrier from liability for negligence, and is, therefore, void and contrary to public policy, *Liverpool Steam Co.* v. *Phenix Insurance Co., supra; Railway Co.* v. *Stevens, supra; Railroad Co.* v. *Pratt, supra,* notwithstanding the provisions of the Harter and Carriage of Goods by Sea Acts. This argument must be rejected. 326

§3 of the Harter Act effected a change in the policy of the law. See *The Jason,* 225 U. S. 32, 53, 55 (1912); *The Irrawaddy, supra,* at 193. Contractual provisions which would formerly have been invalid because inconsistent with the duty of care in the navigation of the vessel owed by the carrier to the cargo owner were no longer so, since the Harter Act absolved the carrier from liability to the cargo owner for negligent navigation. *The Jason, supra.* 327

The Both-to-Blame clause is applicable only when negligent navigation has caused damage to cargo, and operates to relieve the carrier from indirect liability to the cargo owner for such damage. As in *The Jason, supra,* this is consistent with the policy declared by §3 of the Harter Act, and §4 (2)(a) of the Carriage of Goods by Sea Act. The statutes deprive the cargo owner of any right of action against the carrier for negligent navigation by the carrier's servants, and where there is no enforceable right, it cannot be said that there is any duty. The clause therefore is not inconsistent with the ship-

328 owner's duty of care in navigation. *The Jason* also is ample authority for the proposition that no explicit statutory authorization for a given contractual provision need be found. It is sufficient that the contractual provision is consistent with public policy as declared in the statutes and cases, and is otherwise reasonable.

I know of no other public policy with which the clause is inconsistent. The benefit of insurance cases are inapplicable, since, as pointed out in discussing §3 (8) of the Carriage of Goods by Sea Act, such clauses are invalid only when the clause indirectly relieves the carrier of an essential duty owed to the cargo owner. No such duty
329 is here involved. The *Ansaldo San Giorgio* v. *Rheinstrom Co.*, 294 U. S. 494 (1935) is inapposite, since it dealt with the duty of care in the stowage of the goods. Neither statute relieves the carrier of liability for negligence in the performance of this duty. Cf. §3 (2) of Carriage of Goods by Sea Act, *supra*.

Neither the *Chattahoochee*, *supra*, nor *Erie Railroad Co.* v. *Erie & Western Transportation Co.*, *supra*, announce any public policy with which the Both-to-Blame clause conflicts. They hold that §3 of the Harter Act did not purport to affect the rights of the carrier as against
330 another ship when both had been negligent and a collision between them occurred. The non-carrying ship was still entitled, in a division of damages, to reimbursement by set-off or recoupment of one-half of what it had paid to the owners of cargo aboard the carrier. This rule remains unaffected by the workings of the Both-to-Blame clause, and the burdens resulting from the collision of two negligently navigated ships will continue to be allocated as in the past. The fact that the carrier recovers part of what it loses in the division of damages from some other source does not subvert the principles implicit in the rule of these two cases.

Concededly, the Both-to-Blame clause produces a result 331
which is inconsistent with that reached by the application of the *Atlas* rule, as in *Aktieselskabet Cuzco* v. *Sucarseco*, 294 U. S. 394 (1935). That case held that the cargo owner, in asserting his claim against the non-carrying ship, may recover the amount for which he is liable to the carrier as a contributor to general average. But neither in that case, nor in the cases where the *Atlas* rule was earlier propounded and developed, was there any contractual provision involved which would alter the result effected by the application of the *Atlas* rule. There is nothing in these cases which requires me to invalidate such a contractual provision as is before me, provided 332
the provision is otherwise "just and reasonable." *Express Co.* v. *Caldwell*, 21 Wall. 264, 266-8 (1874); *Liverpool Steam Co.* v. *Phenix Insurance Co.*, *supra*, at 441-2; *Railroad Co.* v. *Pratt*, *supra*, at 134.

The only remaining question, therefore, is whether it is just and reasonable for the carrier, by contract, to deprive the cargo owner of 50% of the amount which he receives from the non-carrying ship for the damage caused to cargo, and thus to increase the cargo owner's insurance costs. Cf. *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139, 148-9 (1918). I conclude that it is. 333

Two rules of law are affected by the operation of the Both-to-Blame clause, and its reasonableness must be appraised in the light of both.

First, it affects the carrier's liability to the cargo owner for damage caused to cargo due to negligent navigation. Cf. *The Cockatoo*, 61 F. 2d 889 (2d Cir. 1932), cert. den. 287 U. S. 669 (1932). In so far as the clause relieves the carrier of this liability it is an implementation of the statutes heretofore discussed. The reasonableness of the clause necessarily follows in so far as it has this effect for it is not for this Court to find unreasonable a policy which has commended itself to the Congress, and has

334 become the law of the land. *The Irrawaddy, supra,* at 193; *U. S.* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 340 (1897).

Secondly, the Both-to-Blame clause deprives the cargo owner of a portion of the proceeds resulting from the enforcement of his right to recover his entire damages from one of two joint tort-feasors. In so far as the clause has this effect it is a reasonable recognition of the realities flowing from the admiralty division of damages rule and the policy found in the statutes discussed above. By virtue of the division of damages rule, the non-carrier is in fact responsible for only 50% of the damage to cargo.
335 The clause thus results in a recovery by the cargo owner of the full amount which the law has ruled the non-carrying ship should ultimately be liable to pay, while depriving the cargo owner of a recovery for damage to cargo for which the carrier would be responsible as part of equalized collision damage, but the risk of which the statute declares should be borne by the cargo owner himself.

Admittedly, this result does some violence to the theory that each joint tort-feasor should be liable for the entire damage caused, cf. Restatement, Torts, §439, but this theory gives scant recognition to the realities of the situation under the division of damages rule. The Both-to-
336 Blame clause does recognize these realities, and I can see no basis for holding that such recognition is unreasonable.

I do not mean to be understood as saying that the rule of the *Atlas* is unreasonable, and should be rejected, nor do I reject its applicability in the absence of the situation presented to me in this case. I merely hold that the contractual device the parties have adopted is not unreasonable. In this conclusion, I am in accord with the only other judge who has passed upon the issues, see *The W. W. Bruce, supra.*

In addition, and as further indicating the reasonableness of the clause, it results in a greater certainty in the

allocation of the risks incidental to ocean navigation. It 337
also corrects the anomalous result of the operation of the *Chattahoochee* and *Atlas* rules which led shipowners "to adopt extraordinary precautions to avoid being sued in the United States and has also given rise to some remarkable efforts to gain the advantage of the American rule". Knauth, Ocean Bills of Lading, 176 (3d ed. 1947), see 176-7 for illustration.

Finally, the statutes express a legislative policy that carriers should not and that cargo owners should bear the risk of damage to cargo due to the carrier's negligent navigation by its servants. I do not see how I can in- 338
validate the contractual provision by asserting a directly contrary policy to be controlling.

I hold that the Both-to-Blame clause is reasonable, and not inconsistent with public policy, and therefore valid.

Decree in accordance with opinion.

Dated: May 9, 1950.

HAROLD R. MEDINA,
U. S. D. J.

Interlocutory Decree. 339

[SAME TITLE.]

The above entitled suit and cross-suit having come on for trial in this Court before Honorable Harold R. Medina, United States District Judge, on December 21 and 22, 1948, and January 11 and 12, 1949, and the parties having appeared by their respective counsel and having submitted a stipulation to the Court, dated February 1, 1947, providing, among other things, that the collision between M. V. "Esso Belgium" and S. S. "Nathaniel Bacon" re-

340 ferred to in the pleadings herein occurred by reason of negligence and fault in navigation on the part of both vessels, and without the act, fault or neglect of the shippers, consignees, owners or insurers of the cargo on S. S. "Nathaniel Bacon";

AND the parties hereto having agreed upon all the issues herein, except as to the right of United States of America, as owner of S. S. "Nathaniel Bacon", to recover indemnity from the respondents-impleaded

Farr Sugar Corporation
341 Schieffelin & Company
Park & Tilford Import Corporation
Standard Food Products Corporation
P. Lorillard Company, Inc.
Lamborn & Company, Inc.
American Spirits Inc.
McKesson & Robbins Inc.
Canada Dry Ginger Ale, Inc.
R. C. A. Mfg. Company
"21" Brands Inc.
H. Duys & Company, Inc.
Hamburger Bros. & Company, Inc.
342 Porcella Vincini & Company, Inc.
General Cigar Company, Inc.
Durlach Bros., Inc.
S. Ruppin Inc.
Julius Wile Sons & Company, Inc.
L. W. Minford & Company, Inc.
V. Cassazza & Bro., Inc.
Equitable Trading Corporation
Picardy Mills Inc.
Cambridge Handkerchief Works, Inc.
Lande & Miskind Inc.
David E. Schwab & Company, Inc.

Bernard Ulmann Company, Inc. 343
Joseph Love Inc.
J. Sklar Mfg. Company, Inc.
Red Star Button Company, Inc.
Tiny Town Togs Inc.
A. N. Saab Co., Inc.
Block Freres Inc.
Aris Gloves Inc.
J. H. Kimball, Inc.
David F. Schwab & Company, Inc.
J. Zurcher Company, Inc.
Nurse-Wear Hosiery Company, Inc.
Peter J. Michels Inc. 344
Guzofsky-Kalinsky Inc.
Hyman & Hyman Beauty Prod. Inc.
Arnold M. Ebbe Company, Inc.
Solex Laboratories Inc.
International General Elec. Company
The Hills Bros. Company
Porto Rican Express Company
Manhattan Shirt Company
J. Jolles Studios
I. Shalom & Company
Saxe Bendit Company
Handcraft Undergarment Company 345
General Handkerchief Company
Malina Company
F. Schumacher & Company
Miami Valley Tobacco Company
Plazuela Sugar Company
N. Y. & P. R. R. S. S. Company
Westinghouse Electric Int'l. Company
Mathieson Alkali Works Inc.
Nash-Kelvinator Company
The Frank Tea & Spice Company
I. Lewis Cigar Mfg. Company

346 Consolidated Cigar Corporation
The Virgin Islands Company
J. Stromeyer Company
Paris Beauty Supply Company
The Glemby Company, Inc.
Tin Salvage Institute
Delite Products Company
American Lady Specialties Mfg. Company
Gibbs & Company
M. B. Cohen Company
Lanza Silk Dyeing Company, Inc.
D'Angelo Silk Throwing Company
347 Brower Bros. Silk Company, Inc.
Leonard Custom Tailors Company
Lederle Laboratories Inc.
Tanners Shoe Company
Samuel & Benj. L. Grabosky (first name fictitious)
Bernard O. Clark (first name fictitious)
Kenneth Krack (first name fictitious)
Otto Muller
Ralph Williams
Gerald Udell
Mrs. Tom Ritchie
348 Walter E. Lord
Henry L. Gilgoff (first name fictitious)
Wilbur H. Holly
Robert A. Irizarry (first name fictitious)
Jose Ortiz
Margarite Jensen
Arthur E. Mann (first name fictitious)
Frank A. Delaney
Jacob Tanenbaum
Harry A. Nadler (first name fictitious)
Manuela Diaz
Joseph A. Rivera (first name fictitious)
Mrs. Daisy Terrano

Abraham Radinsky, doing business under the name Pacific Undergarment Company 349

David and Larry Kliven, doing business under the name Peerless Undergarment Company

P. E. Anderson—G. J. Briasco, doing business under the name John H. Rodriguez Company

John Bass, John B. Warnock, Theodore Mutter, doing business under the name L. W. & P. Armstrong Inc.

George, Michael, Joseph Mabarak, doing business under the name Mabarak Bros.

Julius Baer, Carl Badman, doing business under the name B. Dickson & Co. 350

Jules A. Des Angles, doing business under the name Jules A. Des Angles Co. Inc.

David A. and Selim A. Sutton, doing business under the name A. D. Sutton & Sons.

Jacob Maleh, Sam and Jack Hamway, doing business under the name Maleh & Hamway

Rudolph and Harry Attillo, Sydney de Mea, doing business under the name De Mea Bros.

Ben Guzofsky, doing business under the name Ben Gee Sales Co.

George, Elias and Ameen Bardwil, doing business under the name George E. Bardwil & Sons 351

Nathan Lachoff, doing business under the name Estelle Dress & Sportswear Co.

Juan Mas, doing business under the name J. Mas & Co.

Samuel Rochelson, David Rudolf, doing business under the name Osage Handkerchief Co.

owners of cargo laden on said S. S. "Nathaniel Bacon", by reason of the Both-to-Blame Collision Clause contained in paragraph 9 of the bills of lading covering said cargo and quoted in the impleading petition; and

352 IT HAVING BEEN AGREED by the parties hereto that interest on the claims asserted by the intervening petitioners

Atlantic Mutual Insurance Company
Federal Insurance Company
Home Insurance Company
Fidelity Phenix Fire Insurance Company
Firemen's Insurance Company
Glens Falls Insurance Company
Standard Marine Insurance Company, Ltd.
St. Paul Fire & Marine Insurance Company
Queen Insurance Company of America
353 Star Insurance Company of America
Insurance Company of North America
Firemen's Fund Insurance Company
United States Fire Insurance Company
Agricultural Insurance Company
Commercial Union Assurance Company, Ltd.
Westchester Fire Insurance Company
Hanover Fire Insurance Company

insurers of cargo laden on the S. S. "Nathaniel Bacon", shall not be recoverable except from the date of the final decree herein;

354 AND it appearing that the United States of America, libellant and cross-respondent, and Belgian Overseas Transport, S. A., claimant and cross-libellant, have agreed that the damages resulting from the aforesaid collision shall, as between the said parties, be borne in the following proportions, that is, one-third by the United States of America, as owner and operator of the S. S. "Nathaniel Bacon", and two-thirds by Belgian Overseas Transport, S. A., as owner and operator of the M. V. "Esso Belgium";

AND the Court having made and filed its opinion dated May 9, 1950, sustaining the validity of the Both-to-Blame

Collision Clause and allowing to petitioner, United States of America, recoveries against the above named respondents-impleaded as prayed for, it is 355

ORDERED that the above entitled suit and cross-suit be and they hereby are consolidated under Docket No. A126-101 and the caption thereof for all future purposes; and it is

ORDERED, ADJUDGED AND DECREED, as follows:

1. The facts stated in said stipulation dated February 1, 1947, are hereby made the findings of fact, and the conclusions of law stated in said opinion dated May 9, 1950, are hereby made the conclusions of law, of this Court herein. 356

2. That the aforesaid collision between the S. S. "Nathaniel Bacon" and M. V. "Esso Belgium" occurred by reason of negligence and fault in navigation on the part of both vessels, and that the said collision and any loss or damage sustained by any of the parties hereto as a result of said collision occurred without the act, fault or neglect of the shippers, consignees, owners or insurers of cargo laden on the S. S. "Nathaniel Bacon", their agents, or their servants, and that the damages resulting from the aforesaid collision shall be borne as between the United States of America, libellant-cross-respondent, and Belgian Overseas Transport, S. A., claimant-cross-libellant, one-third by the United States of America and two-thirds by Belgian Overseas Transport, S. A. 357

3. That each of the intervening petitioners above named do have and recover from M. V. "Esso Belgium", her claimant and stipulators for value, the full amount of

its legal damages as insurer of cargo laden on S. S. "Nathaniel Bacon" resulting from the aforesaid collision, in such amount as may be determined by agreement of the parties herein or by the Commissioner hereinafter designated and by this Court, but without interest for the period prior to the entry of the final decree herein.

4. That such sums as the intervening-petitioners shall be determined to be entitled to recover from M. V. "Esso Belgium", her claimant and stipulators, be treated as part of the damages of Belgian Overseas Transport, S. A., as owner of the said vessel, and that the damages of the respective vessel owners having been determined, United States of America do have and recover of and from the M. V. "Esso Belgium", her claimant and stipulators, the amount, if any, by which two-thirds of the damages of United States of America exceed one-third of the damages of Belgian Overseas Transport, S. A. or (as the case may be) that Belgian Overseas Transport, S. A. do have and recover from United States of America the amount, if any, by which one-third of the damages of Belgian Overseas Transport, S. A. exceeds two-thirds of the damages of United States of America.

5. That United States of America, cross-respondent and petitioner, do have and recover from each of the respondents-impleaded above named, respectively, such amount as will indemnify it in respect of any amount set off, recouped or recovered by Belgian Overseas Transport, S. A., as owner of M. V. "Esso Belgium", from or against United States of America, as owner of S. S. "Nathaniel Bacon", by reason of any recovery from M. V. "Esso Belgium", her claimant or stipulators for value, on account of said collision by any of the intervening-petitioners above named as insurer of cargo laden on the

S. S. "Nathaniel Bacon" and owned by said respondent-impleaded. 361

6. This cause is hereby referred to Richard T. O'Connell, Esq., as Commissioner, to ascertain and compute the amount of the damages of the respective parties and to report thereon to this Court with all convenient speed.

New York, N. Y., August 21st, 1950.

HAROLD R. MEDINA,
U. S. D. J.

362

We hereby consent to the form of the foregoing decree and that the recovery of the libellant, or of the cross-libellant, as the case may be, and the recovery of the respective intervening-petitioners, be as set forth in this Interlocutory Decree and we waive notice of settlement thereof.

IRVING H. SAYPOL,
By EDWARD L. SMITH,
Proctor for Libellant, Cross-Respondent and Petitioner, United States of America.

363

KIRLIN CAMPBELL HICKOX & KEATING,
Proctors for Claimant and Cross-Libellant, Belgian Overseas Transport, S. A.

BIGHAM ENGLAR JONES & HOUSTON,
Proctors for Intervening-Petitioners and Respondents-Impleaded above named.

Notice of Appeal.

364

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

A 126-101.

UNITED STATES OF AMERICA, as owner of S. S. "NATHANIEL BACON", and as bailee of her cargo,

Libellant,

—against—

M. V. "ESSO BELGIUM", her engines, boilers, tackle, etc.,
365 and BELGIAN OVERSEAS TRANSPORT, S. A.

Claimant,

ATLANTIC MUTUAL INSURANCE COMPANY, et al.,

Intervening-Petitioners.

A 126-167.

BELGIAN OVERSEAS TRANSPORT, S. A., as owner of M. V. "ESSO BELGIUM",

Cross-Libellant,

—against—

366

UNITED STATES OF AMERICA, as owner of S. S. "NATHANIEL BACON",

Cross-Respondent and Petitioner,

FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., et al.,

Respondents-Impleaded.

Sirs:

PLEASE TAKE NOTICE, that Farr Sugar Corporation and American Spirits, Inc., et al., respondents impleaded,

hereby appeal to the United States Court of Appeals for 367
the Second Circuit from the interlocutory decree entered in the above entitled consolidated cause on the 11th day of September, 1950, but only in so far as said decree awards cross-respondent and petitioner, United States of America, a recovery against said respondents impleaded, Farr Sugar Corporation and American Spirits, Inc., et al., of such amount as will indemnify it in respect of any amount setoff, recouped or recovered by Belgian Overseas Transport, S. A., as owner of M. V. "Esso Belgium", from or against United States of America, as owner of S. S. "Nathaniel Bacon", by reason of any recovery from M. V. "Esso Belgium", her claimant or stipulators for 368
value on account of the collision referred to in the said decree by any of the intervening petitioners as insurers of cargo laden on the S. S. "Nathaniel Bacon" and owned by said respondents impleaded.

Dated: New York, N. Y. September 21, 1950.

Yours &c.,

BIGHAM, ENGLAR, JONES & HOUSTON,
Proctors for Respondents impleaded,
Office & P. O. Address, 369
99 John Street,
New York 7, N. Y.

Notice of Appeal.

370 To:

IRVING H. SAYPOL, Esq.,
U. S. Attorney,
45 Broadway, New York 6, N. Y.

and

BURLINGHAM, VEEDER, CLARK & HUPPER, Esqs.,
27 William Street, New York 5, N. Y.,
Proctors for Libellant, Cross-Respondent and
Petitioner United States of America.

371 KIRLIN, CAMPBELL, HICKOX & KEATING, Esqs.,
Proctors for Respondent and Libellant,
Belgian Overseas Transport, S. A.,
120 Broadway, New York 5, N. Y.

The foregoing appeal is hereby allowed.

Dated: New York, N. Y., September 21, 1950.

SYLVESTER J. RYAN,
U. S. D. J.

372

Assignment of Errors.

373

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

A 126-101.

UNITED STATES OF AMERICA, as owner of S. S. "NATHANIEL BACON", and as bailee of her cargo,
Libellant,

—against—

M. V. "Esso BELGIUM", her engines, boilers, tackle, etc., and BELGIAN OVERSEAS TRANSPORT, S. A.
Claimant, 374

ATLANTIC MUTUAL INSURANCE COMPANY, et al.,
Intervening-Petitioners.

A 126-167.

BELGIAN OVERSEAS TRANSPORT, S. A., as owner of M. V. "Esso BELGIUM",
Cross-Libellant,

—against—

UNITED STATES OF AMERICA, as owner of S. S. "NATHANIEL BACON",
Cross-Respondent and Petitioner, 375

FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., et al.,
Respondents-Impleaded.

Farr Sugar Corporation, et al. hereby assign error to the decision and decree of the District Court in the following respects:

1. In that the District Court held that in substance the both-to-blame clause purports to absolve the shipowner from liability for negligent navigation.

Assignment of Errors.

376 2. In that the District Court held that the both-to-blame clause is not in conflict with any provision of the Carriage of Goods by Sea Act.

3. In that the District Court held that the both-to-blame clause is not in conflict with any public policy of the United States.

4. In that the District Court held that the both-to-blame clause is not unreasonable.

5. In that the District Court failed to hold that the
377 both-to-blame clause is in conflict with Section 4(3) of the Carriage of Goods by Sea Act.

6. In that the District Court failed to hold that the clause is in conflict with Section 3(8) of the Carriage of Goods by Sea Act.

7. In that the District Court failed to hold that the clause is in conflict with the public policy of the United States.

8. In that the District Court failed to hold that the
378 both-to-blame clause is unreasonable.

9. In that the District Court found that the proposal that Section 4(3) be amended in such fashion as specifically to invalidate the both-to-blame clause, was rejected by the Committee on Commerce, United States Senate, 74th Congress, 1st Session (1935) and/or by the Committee on Merchant Marine & Fisheries, House of Representatives, 74th Congress, 2nd Session (1936).

10. In that the District Court held that Section 4(3) of the Carriage of Goods by Sea Act does not invalidate the both-to-blame clause.

Assignment of Errors.

11. In that the District Court held that Section 3(8) of the Carriage of Goods by Sea Act does not invalidate the both-to-blame clause. 379

12. In that the District Court found that the clause operates to relieve the carrier from indirect liability to the cargo owners.

13. In that the District Court held that it was not unreasonable for a common carrier of goods by sea to require of a shipper as a condition of the carriage of his goods the agreement contained in the both-to-blame clause to indemnify such common carrier against his liability to another vessel owner incurred by reason of his negligence. 380

14. In that the District Court held that the operation of long established principles of the law of admiralty relating to the division of damages between negligent shipowners results in an anomaly.

15. In that the District Court held that the both-to-blame clause results in greater certainty in the allocation of risks incidental to ocean navigation.

381

16. In that the District Court held that the both-to-blame clause is reasonable, and not inconsistent with public policy, and therefore valid.

17. In that the District Court failed to hold that the both-to-blame clause is unreasonable and inconsistent with public policy and therefore void.

BIGHAM, ENGLAR, JONES & HOUSTON,
Proctors for Respondents-Impleaded,
Office & P. O. Address,
99 John Street,
New York 7, N. Y.

Stipulation as to Exhibits.

382

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

A 126-101.

UNITED STATES OF AMERICA, as owner of the S. S. "NATHANIEL BACON", and as bailee of her cargo,
Libellant,

—against—

M. V. "ESSO BELGIUM", her engines, boilers, tackle, etc.,
383 Respondent,

ATLANTIC MUTUAL INSURANCE COMPANY, et al.,
Intervening-Petitioners.

A 126-167.

BELGIAN OVERSEAS TRANSPORT, S. A., as owner of M. V. "ESSO BELGIUM",
Libellant,

—against—

UNITED STATES OF AMERICA, as owner of the
384 S. S. "NATHANIEL BACON",
Respondent,

FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., et al.,
Impleaded.

IT IS HEREBY STIPULATED AND AGREED by and between the proctors for the respective parties hereto that libellants' Exhibits 2-13 inclusive and intervenors' Exhibits A-F inclusive may be omitted from the printed record on appeal herein but may be quoted or printed in whole or in part in briefs or as appendices to briefs or may be handed up to the Court upon the argument of this appeal by any

party hereto with the same force and effect as though 385
reproduced in the record in full.

Dated: New York, N. Y., October 16, 1950.

IRVING H. SAYPOL,
U. S. Attorney.
BURLINGHAM VEEDER CLARK & HUPPEL,
Of Counsel
Proctor for Libellant and for Petitioner,
United States of America.

KIRLIN CAMPBELL HICKOX & KEATING, 386
Proctors for Claimant and Cross-Libellant,
Belgian Overseas Transport, S. A.

BIGHAM, ENGLAR, JONES & HOUSTON,
Proctors for Intervening Petitioners
and Respondents-Impleaded.

387

388 **Stipulation as to Record.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

A 126-101.

UNITED STATES OF AMERICA, as owner of
S. S. "NATHANIEL BACON", and as bailee of her cargo,
Libellant-Appellee,

389 —against—

M. V. "ESSO BELGIUM", her engines, boilers, tackle, etc.;
BELGIAN OVERSEAS TRANSPORTS, S. A.,
Claimant-Appellee,

ATLANTIC MUTUAL INSURANCE COMPANY, et al.,
Intervening-Petitioners-Appellants.

A 126-167.

BELGIAN OVERSEAS TRANSPORTS, S. A., as owner of
M. V. "ESSO BELGIUM",
Cross-Libellant-Appellee,

390

—against—

UNITED STATES OF AMERICA, as owner of
S. S. "NATHANIEL BACON",
Cross-Respondent and Petitioner-Appellee,

FARR SUGAR CORPORATION, AMERICAN SPIRITS INC., et al.,
Respondents-Impleaded-Appellants.

IT IS HEREBY STIPULATED AND AGREED by and between proctors for the respective parties hereto, that the fore-

going is a true transcript of the record in the District Court in this proceeding as agreed on by the parties. 391

Dated: New York, N. Y., January 22nd, 1951.

BIGHAM, ENGLAR, JONES & HOUSTON,
Proctors for Intervening-Petitioners and
Respondents-Impleaded-Appellants.

IRVING H. SAYPOL,
United States Attorney.
BURLINGHAM, VEEDER, CLARK & HUPPER,
Of Counsel 392
Proctor for Libellant and Petitioner-Appellee,
United States of America.

KIRLIN, CAMPBELL, HICKOX & KEATING,
Proctors for Claimant and Cross-Libellant-
Appellee, Belgian Overseas Transports, S. A.

393

Clerk's Certificate.

394

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

A 126-101.

UNITED STATES OF AMERICA, as owner of
S. S. "NATHANIEL BACON", and as bailee of her cargo,
Libellant-Appellee,

—against—

M. V. "ESSO BELGIUM", her engines, boilers, tackle, etc.,
395 BELGIAN OVERSEAS TRANSPORTS, S. A.,
Claimant-Appellee,

ATLANTIC MUTUAL INSURANCE COMPANY, et al.,
Intervening-Petitioners-Appellants.

A 126-167.

BELGIAN OVERSEAS TRANSPORTS, S. A., as owner of
M. V. "ESSO BELGIUM",
Cross-Libellant-Appellee,

—against—

396 UNITED STATES OF AMERICA, as owner of
S. S. "NATHANIEL BACON",
Cross-Respondent and Petitioner-Appellee,

FARR SUGAR CORPORATION, AMERICAN SPIRITS INC., et al.,
Respondents-Impleaded-Appellants.

United States of America,
Southern District of New York—ss.:

I, WILLIAM V. CONNELL, Clerk of the District Court of the United States of America for the Southern District

Clerk's Certificate.

of New York, do hereby certify that the foregoing is a 397
correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

The last day to file the Record is , 1951.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this day of January, in the year of our Lord one thousand nine hundred and fifty-one and of the Independence of the said United States the one hundred and seventy-fifth.

398

WILLIAM V. CONNELL,
Clerk.

(Seal)

399

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1950

No. 252

Argued May 7, 1951. Decided August 31, 1951

Docket No. 21990

UNITED STATES OF AMERICA, LIBELLANT-APPELLEE

v.

FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., ET AL., RESPONDENTS-IMPLEADED-APPELLANTS.

Before: SWAN, AUGUSTUS N. HAND and CLARK, *Circuit Judges*

Appeal from the United States District Court for the Southern District of New York

Cross-libels by United States of America, as owner of S.S. "Nathaniel Bacon," and Belgian Overseas Transport, S. A., as owner of M. V. "Esso Belgium," to recover respectively for damages resulting from a collision of the two vessels, wherein Farr Sugar Corporation, American Spirits Inc., and others, cargo owners or their representatives, were impleaded or intervened. From an interlocutory decree in the consolidated action settling the respective rights of the parties and holding the impleaded respondents liable over to indemnify the United States of America under a "Both-to-Blame" clause of their bills of lading, D. C. S. D. N. Y., 90 F. Supp. 836, these respondents appeal. Reversed.

Leonard J. Matteson of New York City (*Bigham, Englar, Jones & Houston, Oscar R. Houston* and *Richard F. Shaw*, all of New York City, on the brief), for appellants Farr Sugar Corporation and American Spirits, Inc.

Roscoe H. Hupper, of New York City (*Irving H. Saypol*, U. S. Atty., *Burlingham, Veeder, Clark & Hupper* and *Benjamin E. Haller*, all of New York City, on the brief), for the United States, appellee.

Cletus Keating, of New York City (*Kirlin, Campbell & Keating, Edwin S. Murphy* and *Louis J. Gusmano*, all of New York City, on the brief), for Belgian Overseas Transport, S. A., claimant-libellant.

CLARK, *Circuit Judge:*

This appeal presents only a single legal issue, but a vastly important one in its effect on seagoing commerce and the carriage of

goods by ships. It is the validity of the "Both-to-Blame" collision clause now commonly inserted in ocean carriers' bills of lading. As is now well known, federal legislation has relieved shipping of the ancient insurer's liability toward cargo and even of its responsibility for negligent navigation; but Supreme Court decisions have held that cargo may recover in full against a non-carrying ship negligently in collision with its carrier, and that the non-carrier may recover in part, under the rule of divided damages, from the also negligent carrier. To correct this asserted "anomaly" the shipowners devised the clause in question, which requires the cargo to return to its carrier the amounts thus "received indirectly." Cargo owners maintain that such a provision violates both the long-standing admiralty and common-law prohibitions against carrier limitations of liability and also specific prohibitions of the federal statutes; while shipowners contend that the clause is in aid of the public policy expressed in the legislation, and merely corrects a manifest paradox.

Such is the background of this case, which arose specifically when the S. S. Nathaniel Bacon, owned by the United States, collided in New York Harbor on November 24, 1942, with the M. V. Esso Belgium, owned by Belgian Overseas Transport, S. A. Both the vessels and the cargo, which was aboard the "Nathaniel Bacon," thereby sustained damage. After the shipownes instituted libels, cargo owners were impleaded in one; and, in the other, insurance companies which had paid for the cargo losses intervened. The parties have stipulated that both vessels were at fault, and that the damage should be divided here one-third against the United States as owner of the "Nathaniel Bacon" and two-thirds against the "Esso Belgium's" owner. The libels were consolidated and the only matter remaining in dispute, before the entry of an interlocutory decree was the claim for indemnity made by the United States against the cargo owners under the "Both-to-Blame" clause in the bills of lading.[1] The district court held the clause valid, 90 F. Supp. 836, and its interlocutory decree was therefore framed to provide for ultimate indemnity to the United States of any amounts decreed in favor of

---

[1] Paragraph 9 of the bills of lading is as follows:

"If the ship comes in collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the

cargo owners from the "Esso Belgium" and in turn recovered by the latter from the United States. From this decree the cargo owners have appealed.

Quite probably a court has no more delicate problem placed before it than that of deciding whether to fill in an asserted gap in remedial legislation. Surely a court is under some obligation to see that hard-won reforms are workable as the legislature has intended, or, perhaps, would have intended had the specific problem been foreseen. On the other hand, since so much of legislative change is a product of compromise, of the ameliorative and abrasive effects of various pressures, care must be taken lest what is lost in the legislative halls be granted by courts in the guise of "interpretation." No general guide can be stated; in is always a question of how much and how far. Here Judge Medina in the court below was persuaded that an undesired gap existed and ought to be closed—or rather that the shipowners should not be forbidden to close it. There is no doubt that he has stated a persuasive case demonstrating how, under existing law in the absence of the clause, the shippers may recover 100 per cent of their loss when they can trace it back to two negligent navigators rather than simply to one; and he finds a useful analogy in the accepted validity of the "Jason clause" with respect to general average, hereinafter discussed. The question is obviously one of difficulty and no sure answer can be expected until the Supreme Court has passed upon the matter. But on balance we think the decision goes too far; it allows the carriers to be legislators beyond present justification.

The able arguments in this case went into details as to the back-

---

other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier.

"The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact."

This is the form of the "Both-to-Blame" clause which has been in use in the North Atlantic Freight Conference since Sept. 1, 1937. Robinson, Admiralty 872, 873, 1939; Knauth, Ocean Bills of Lading 95, 136, 175, 3d Ed. 1947. An earlier form in use before the passage of the Carriage of Goods by Sea Act in 1936 (see Knauth, *op. cit., supra,* at 254) was upheld in *The W. W. Bruce,* D. C. E. D. N. Y., 14 F. Supp. 894; but on appeal the court found that seaworthiness of the vessel in all respects had not been proven, thus rendering it unnecessary to consider "the much debated legal question as to the validity of the both-to-blame collision clause." 2 Cir., 94 F. 2d 834, 837, certiorari denied *Pacific-Atlantic S. S. Co.* v. *Weyerhaeuser Timber Co.,* 304 U. S. 567.

ground and specific content of the legislative enactments. These we shall examine. But before we do so, we may state certain general conclusions. First, the correction of the "anomaly" must often be at most a rough and perhaps uncertain approximation of justice. The formal necessity of three successive suits pressed to conclusion—except as consolidation may somewhat lessen the duplication—makes for uncertainty at the outset; jurisdiction may not be freely obtainable in each instance, and the suits, for lack of legal right or perhaps inclination or determination, may stop before justice is fully assuaged. Then the non-carrier may be in a position to seek a limitation of its liability and may choose to do so. This can lead to various strange situations where advantages and disadvantages to shipper and carrier may turn upon a third party's legal position or choice as to such limitation.[2] Moreover, the American rule of divided, rather than proportionate, damages may seem as unfair in this connection as it has in others; had the parties not stipulated in our present case, we might well have had a situation where the cargo owners found themselves cut down to half recovery, although one navigator, on the parties' own premise, was twice as negligent as the other. Of course rough justice may be better than none; on the other hand, the role of *deus ex machina* is not lightly to be assumed by one who lacks official standing for the role.

Second, the prohibition against special contracts limiting liability is one of great strength in our law and survives all but definite and clear restrictions or limitations upon it authorized by the Congress itself. This we point out in some detail below.

Third, the clause in question patently overturns settled principles of our law which have long been the subject of discussion in learned

---

[2] For example, the operation of the rule that a negligent shipowner may not share equally with an innocent cargo owner in the distribution of the limitation fund of a third party. *The George W. Roby*, 6 Cir., 111 F. 601, 614-621, certiorari denied *Lakeland Transp. Co.* v. *Miller*, 183 U. S. 699; *Petition of Socony Vacuum Transp. Co.*, D. C. S. D. N. Y., 93 F. Supp. 718, 739, could mean that the cargo claims would exhaust the fund. Counsel suggests that since there is then no recoupment by the non-carrier there remains no possibility of liability for indemnity by the cargo. Quite possibly this is so. But could it not be reasonably claimed that cargo should repay which it has prevented its carrier from recovering?

Other anomalous results depending on the non-carrier's limitation of liability will readily come to mind. Certainly that possibility is suggested by the view of the court below, D. C. S. D. N. Y., 90 F. Supp. 836, 842, as to "the realities of the situation under the division of damages rule" where "the non-carrier is in fact responsible for only 50% of the damage to cargo."

articles and treatises, in the halls of Congress, and in conferences and conventions with other countries. Two such settled principles are the particular subject of sustained and vigorous attack by the shipowners here, as their position necessarily demands; namely, the rule allowing cargo to recover *in solido* for its full damage against the negligent non-carrier, and the rule in turn allowing the non-carrier to include sums so paid cargo as part of its damage in seeking divided damages against the negligent carrier. These rules, it is true, were expounded by the Supreme Court rather than set by Act of Congress; but they have been well settled for more than half a century, have acquired staunch support, and have survived severe attack aimed at legislative change. The shipowners asserted that the clause in question corrects an unfortunate rule peculiar to the United States; as the "Esso Belgium's" brief puts it: "The Both-to-Blame Clause accomplishes by agreement, in the United States, a somewhat similar distribution of cargo loss which is [sic] accomplished by the Collision Convention of 1910 in practically every other maritime country of the world."[3] This appears, on its face, at least, to be a powerful argument in favor of change in the American rule; but the greater the stress upon this argument, the more surely would it seem to follow that correction is for Congress rather than the courts.

One other fact requires special note. The shipowners stress the consensual nature of the clause, arguing that a bill of lading is but a contract. But that is so at most in name only; the clause, as we are told, is now in practically all bills of lading issued by steamship companies doing business to and from the United States. Obviously the individual shipper has no opportunity to repudiate the document agreed upon by the trade, even if he has actually examined it and all of its twenty-eight lengthy paragraphs, of which this clause is No. 9. This lack of equality of bargaining power has long been recognized in our law; and stipulations for unreasonable exemption of the carrier have not been allowed to stand. *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 441; *Inman* v. *South Carolina R. Co.*, 129 U. S. 128, 139; *Santa Fé, P. & P. R. Co.* v. *Grant*

---

[3] The Brussels Collision Convention of 1910, 6 Benedict on Admiralty 3-7, 6th Ed. 1941, was never ratified by the United States Senate, although it remained pending from its submission to the Senate in 1937 until its withdrawal by the President in 1947; and the Senate Committee on Foreign Relations, after conducting hearings in 1938, reported favorably on it in 1939. 6 Benedict, *loc. cit.* and 1951 Supp. 3. The Maritime Law Association seems consistently to have opposed ratification, see Doc. 310, April 1947, and Doc. 311, May 1947; and we find in the record a strong letter in opposition from John M. Woolsey to the Assistant Secretary of Commerce under date of Feb. 14, 1928.

Bros. Const. Co., 228 U. S. 177, 184, 185. Hence so definite a relinquishment of what the law gives the cargo as is found here can hardly be found reasonable without direct authorization of law. Actually the shippers, through official bodies, appear to have registered their opposition where they could and successfully at that, *viz.*, in the halls of legislation.[4]

We now turn directly to the legislative background. Prior to the passage of the Harter Act in 1893, it was said: "By the settled law, in the absence of some valid agreement to the contrary the owner of a general ship, carrying goods for hire, whether employed in internal, in coasting, or in foreign commerce, is a common carrier, with the liability of an insurer against all losses, except only such two irresistible causes as the act of God and public enemies. Molloy, De Jure Maràtimo, bk. 2, chap. 2, §2; Bacon, Abr. 'Carrier.' A; *Barclay* v. *Cuculla y Gana*, 3 Dougl. K. B. 389; 2 Kent, Com. 598, 599; Story, Bailm. §501; *The Niagara* v. *Cordes*, 21 How. 7, 23, 16 L. Ed. 41, 46; *The Lady Pike (Germania Ins. Co.* v. *The Lady Pike)*, 21 Wall. 1, 14, 22 L. Ed. 499, 503." *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.*, *supra*, 129 U. S. 397, 437, approved in *Jahn* v. *The Folmina*, 212 U. S. 354, 361, 15 Ann. Cas. 748. See also *The Delaware*, 14 Wall. 579, 596, 597; *The Maggie Hammond*, 9 Wall. 435, 444; *Clark* v. *Barnwell*, 12 How. 272, 280, 281. The courts were not at all disposed to reduce this responsibility; case after case rings the changes on this principle in various forms.[5]

---

[4] Counsel suggest that shippers are actually not harmed, since they are protected by insurance, and that this is really a contest between insurance underwriters, the cargo underwriters on the one hand and the P. and I. underwriters for the shipowners on the other. We have had like intimations, without exact knowledge, in other cases, so much so that a good share of admiralty litigation might well seem only a contest among insurers; perhaps ignorance of the facts of admiralty life is a blessing in allowing federal judges to keep on working without realizing how futile their labors may be. But beyond such compulsions to continue in pursuit of justice and truth, it would seem that our problem would have more significance than some others. For (1) if ever there may be unsophisticated strays among admiralty litigants, it would seem that they must be among shippers, not all of whom will know all the rules; (2) the objective of federal legisation to provide a code of principles and to outlaw special provisions to be feared and guarded against seems a worthy one; and (3) shifting the burden of insurance costs should not be left to the control and choice of the one group which is seeking to avoid the burden.

[5] See, e.g., *Santa Fé, P. & P. R. Co.* v. *Grant Bros. Const. Co.*, 228 U. S. 177; *The Irrawaddy*, 171 U. S. 187, 189, 190. Moreover, where goods were received aboard in good order and later damaged, it was

Moreover, the scope of operation of "some valid agreement to the contrary" was strictly limited. The rule was thus stated by Mr. Justice White in *The Kensington*, 183 U. S. 263, 268: "It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and will be deemed as wanting in the element of voluntary assent; and, besides, that such conditions are in conflict with public policy. This doctrine was announced so long ago, and has been so frequently reiterated, that it is elementary. We content ourselves with referring to the cases of *Baltimore & O. S. W. R. Co.* v. *Voigt*, 176 U. S. 498, 505, 507, 20 S. Ct. 385, 44 L. Ed. 560, 565 and *Knott* v. *Botany Worsted Mills*, 179 U. S. 69, 71, 21 S. Ct. 30, 45 L. Ed. 90, 93, where the previously adjudged cases are referred to, and the principles by them expounded are restated." So also it was said in *The Jason*, 225 U. S. 32, 49: "Prior to the Harter Act it was established that a common carrier by sea could not, by any agreement in the bill of lading, exempt himself from responding to the owner of cargo for damages arising from the negligence of the master or crew of the vessel. *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co. (The Montana)*, 129 U. S. 398, 438, 9 S. Ct. 469, 32 L. Ed. 788, 791; following *New York C. R. Co.* v. *Lockwood*, 17 Wall. 357, 21 L. Ed. 627."

The Harter Act, passed in 1893, 27 Stat. 445, 46 U. S. C. §§190-195, definitively outlawed clauses or covenants of the bill of lading relieving the vessel's owners or agents from negligence in the care and delivery of cargo or from any obligation to exercise due diligence to make the ship seaworthy; it also, and most importantly, relieved the vessel of liability for losses from faults or errors in navigation or dangers of the sea in general if such diligence was exercised. *The Delaware*, 161 U. S. 459, 471, 472; see L. Hand, *J.* concurring in

---

the carrier's burden to show that the damage or loss was occasioned by one of the excepted causes, if any, contained in the bill of lading. *Jahn* v. *The Folmina*, 212 U. S. 354, 15 Ann. Cas. 748; *Clark* v. *Barnwell*, 12 How. 272. Even this was not all: the carrier had to provide a seaworthy ship, and his warranty to do so was "absolute" and did not "depend on his knowledge or ignorance, his care or negligence." *The Caledonia*, C. C. Mass., 43 F. 681, 685, affirmed 157 U. S. 124, approved in *The Edwin I. Morrison*, 153 U. S. 199, 210; *Martin* v. *The Southwark*, 191 U. S. 1, 6. He also had the burden of showing that his ship was seaworthy at the beginning of the voyage. *Jahn* v. *The Folmina*, *supra*, 212 U. S. at 361-363; *Martin* v. *The Southwark*, *supra*, 191 U. S. at 15, 16; *The Edwin I. Morrison*, *supra*, 153 U. S. at 211. In sum the carrier had not only a very heavy responsibility to his cargo, but also a stiff burden to show that he had discharged that responsibility.

American Mut. Liability Ins. Co. v. *Matthews*, 2 Cir., 182 F. 2d 322, 325, 326. The conditional release from liability for negligence was contained in §3 of the Act, 46 U. S. C. §192, set forth in full in the footnote.[6] The interpretation of this provision restricting the exemption to suits brought directly by or on behalf of cargo owners, made in 1899, in *The Chattahoochee*, 173 U. S. 540, provides the underlying legal principle which the Both-to-Blame clause is designed to overturn. We must therefore examine its development even though the controlling statute here is the Carriage of Goods by Sea Act of 1936 which was incorporated into the bills of lading. 46 U. S. C. §1312. But the latter Act carries on the policy of the earlier statute, removing, however, the condition of due diligence for the exemption from liability of the carrier or ship for "act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship." 46 U. S. C. §1304(2)(a).[7] It also contained a prohibition against clauses lessening liability other than as provided in the Act. 46 U. S. C. §1303(8), discussed below.

It had long been settled that cargo owners could recover in full from a negligent non-carrier in collision with an equally negligent tug which was towing the cargo. *The Atlas*, 93 U. S. 302, 315, reversing the Circuit Court which had held on authority of *The Milan*, 1 Lush. 388, that recovery could be only in proportion to the total negligence—one-half the total loss under the American rule of divided damages. In his opinion Mr. Justice Clifford said: "Noth-

---

[6] "If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service." §3, 46 U. S. C. §192.

[7] The carrier continues to have a duty to exercise due diligence to make the ship seaworthy and to properly man, equip, and supply it, 46 U. S. C. § 1303(1); for loss proximately resulting from his failure to do so, he is held liable. Robinson, Admiralty, 503, 507-513, 1939; Knauth, Ocean Bills of Lading, 135, 136, 3d Ed. 1947.

ing is more clear than the right of a plaintiff, having suffered such a loss, to sue in a common law action all the wrong-doers, or any one of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss."

A next step is that where the owner of goods damaged in a collision involving two negligent vessels does sue the non-carrying vessel and recovers his damages, then the amount paid by the non-carrying vessel becomes part of its own "damages" when the two vessels come to assess their own liability for the collision against each other. Mr. Justice Holmes has stated the principle thus clearly in *Erie R. Co.* v. *Erie & W. Transp. Co.*, 204 U. S. 220, 226: "And it is established, as it logically follows, that the division of damages extends to what one of the parties pays to the owners of cargo on board the other. *The Chattahoochee*, 173 U. S. 540, 19 S. Ct. 491, 43 L. Ed. 801. The right to the division of the latter element does not stand on subrogation, but arises directly from the tort." See also *The Cockatoo*, 2 Cir., 61 F. 2d 889, 891, 892, certiorari denied *Howard* v. *Randall & McAllister*, 287 U. S. 669; and compare *Aktieselskabet Cuzco* v. *The Sucarseco*, 294 U. S. 394, 404.

Appellants have naturally stressed the point here settled that recovery of divided damages is the ship's own right arising from the tort and not a recovery in the right of the cargo. But the damages suffered by the cargo do thus help to determine the amount of recovery by the non-carrier and in this way can be said to be "indirectly" recovered from the carrier. For the non-carrier's damages when ascertained are treated in accordance with the American rule that where two ships are involved in a collision, and both are at fault, the less heavily damaged ship is to pay to the other one-half the difference between the amount of damage suffered by the more heavily damaged ship and that suffered by the one less heavily damaged. This rule appears to date from *The Catharine*, 17 How. 170, 177, 178. It grew old early and is now thoroughly settled. *The James Gray* v. *The John Fraser*, 21 How. 184, 194, 195; *The Maria Martin*, 12 Wall. 31, 42, 43; *The Continental*, 14 Wall. 345, 361; *The Sunnyside*, 91 U. S. 208, 215; *The America*, 92 U. S. 432, 438; *The Potomac*, 105 U. S. 630, 631; *The North Star*, 106 U. S. 17, 22. Though this court, along with others, has from time to time expressed discontent at the American refusal to follow the rule of proportionate division according to the degree of fault now general in the maritime world since the International Convention of 1910, this is obviously a matter of policy for Congress. See Robinson, Admiralty 855, 856-859, 1939.

The final step, settled by *The Chattahoochee*, *supra*, 173 U. S. 540, 555, was that the exemption from direct responsibility of the vessel to cargo granted by the Harter Act did not prevent these successive

recoveries, first by cargo against the non-carrier and second by the latter in part against the carrier. In that case the schooner Golden Rule collided with the steamship Chattahoochee and was totally lost with all her cargo. The steamship was uninjured. Libellants, acting (a) as bailees of the cargo, suing on its behalf, and (b) as owners of the schooner, then sued the steamship for all losses incurred. Both ships were found to be at fault. Holding that cargo must be paid in full, the Court then allowed the steamer to recoup from the schooner one-half of this amount so that its ultimate liability was found by deducting half the value of the cargo from half the value of the sunken schooner. The Court said explicitly that "the relations of the two colliding vessels to each other remain unaffected by this act, notwithstanding one or both of such vessels be laden with a cargo."

Whether or not this case is as definitely erroneous as the shipowners here and others have thought, it would appear to have been thoroughly considered. The arguments of counsel indicate that the views later advanced in criticism were then presented, the opinion shows care, and two justices dissented, albeit without opinion. Moreover, the reasoning of the decision is logical against the American background. Of course it does indicate that the Court was not disposed to lessen the old rigorous obligations of a common carrier without quite clear authority from Congress. The opinion relies on cases which had tended to restrict carriers' advantages and shows that the Court wished to mark a clear separation between the rule for division of damages applicable between ships and other rules which were fashioned for the carriers' benefit. In *The Delaware*, *supra*, 161 U. S. 459, 471, 472, where no question of cargo was involved, a shipowner had urged that the first part of § 3 of the Harter Act absolved him from liability toward another ship for collision damage resulting from his negligent navigation. This construction of the Act was rejected by the Court because it was obvious in the light of the legislative history that the Act was intended to be applied only as between carrier and cargo and had nothing to do with liability between ships. After reciting the evils which the Harter Act was designed to overcome, the Court said: "The act was an outgrowth of attempts, made in recent years, to limit as far as possible the liability of the vessel and her owners, by inserting in bills of lading stipulations against losses arising from unseaworthiness, bad stowage, and negligence in navigation, and other forms of liability which had been held by the courts of England, if not of this country, to be valid as contracts and to be respected even when they exempted the ship from the consequences of her own negligence." In that case, too, it is clear that the Court disapproved vigorously of the shipowners' practices which led to the enactment of the Harter Act, and that it did not want the carriers' liability to be "frittered away." So it is

not surprising to find the Court saying in *The Chattahoochee, supra*, 173 U. S. 540, 555: "This is in effect extending the doctrine of the *Delaware* case, wherein the question of liability for the loss of the cargo was not an issue, to one where the vessel suffering the greater injury is also the carrier of a cargo—in other words, if the Harter act was not intended to increase the liability of one vessel toward the other in a collision case, the relations of the two colliding vessels to each other remain unaffected by this act, notwithstanding one or both of such vessels be laden with a cargo."

Similar indications are also to be found in *The North Star, supra*, 106 U. S. 17, where cargo was not involved, but it was held that where two vessels collided, and both were at fault, the one which was sunken and totally lost could not have limitation of liability until *after* the balance of damages had been struck between the two vessels. Thus the Court's view clearly was that striking the balance of damages between the two vessels was a process independent of other liabilities or the limitation of them. We agree therefore with the recent statement of this court in *American Mut. Liability Ins. Co. v. Matthews, supra*, 2 Cir., 182 F. 2d 322, 324, that "The Harter Act was not intended to affect the liability of one vessel to the other in a collision case."[8] Or as Judge L. Hand said concurring, 182 F. 2d at 326: "Thus, the effect of the doctrine of *The Chattahoochee, supra*, was that the sum of these changes in the owner's duties was not enough to justify extending the release beyond direct claims of shippers." Since, as Judge Medina pointed out, the Carriage of Goods By Sea Act admittedly was designed to continue the public policy of the Harter Act, except for the modification as to the due diligence prerequisite (Knauth, Ocean Bills of Lading 135, 3d Ed. 1947; Robinson, Admiralty 503, 506, 1939), the American policy seems quite clear. It is against the modification sought to be made by the Both-to-Blame clause; the attempt to push the policy of the legislation to a point where it has definitely not gone is in itself legislation.[9]

---

[8] This appears to have been also the view of distinguished experts; thus see Mr. Charles C. Burlingham testifying for the Brussels Collision Convention, *supra* note 3, but conceding that "the policy of the United States is shown not only in the Harter Act, but in the interpretations of the Harter Act, and I suppose that the Chattahoochee is a part of the policy of the United States at this moment, until it is changed." Hearings on Brussels Collision Convention, 1910, before a Subcommittee of the Committee on Foreign Relations, U. S. Senate, 75th Cong., 2d Sess. 72, Jan. 10-14, 1938.

[9] The "Both-to-Blame" clause was specifically before Congress in its consideration of this Act. One representative of shippers proposed that it be specifically invalidated by amendment added to

There remains the issue whether by other provisions of the statutes in question authorization of special contracts of this nature can be spelled out. In the light of this background it seems clear that such authorization must be clear, for otherwise the old prohibitions against contracts cutting down shippers' rights must still prevail. The question here would seem answered by the parties by their very acts showing that such authorization is not clear, for they draw different conclusions from the same provision of the governing Act. Sec. 3(8) of the Carriage of Goods by Sea Act, 46 U. S. C. §1303(8), provides: "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter or section 25 of Title 49, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability." Here the position of the parties may appear somewhat reversed, cargo claiming that this language reaches the liability here, while the shipowners assert that it does not invalidate agreements concerning liability of a carrier, as it may be assessed in accordance with the principles of the divided damage rule. But at least it is additional evidence that Congress meant to grant the carriers only whatever benefits were explicitly set out in the legisla-

---

§4(3), 46 U. S. C. §1304(3); but other shippers' representatives thought a specific prohibition unnecessary and were unwilling to jeopardize the main bill by pressing for it. Hearings before Committee on Commerce, U. S. Senate, on S. 1152, A Bill Relating to Carriage of Goods by Sea, 74th Cong., 1st Sess., 51-59, May 10, 1935; Hearings before Committee on Merchant Marine and Fisheries, House of Representatives, on S. 1152, 74th Cong., 2d Sess. 49-53, Jan. 26, 1936. The parties naturally draw diverse interpretations from this history. On the direct point it appears inconclusive, though the absence of any change of general policy in the Act as a whole remains clear.

The parties are also in disagreement as to the meaning of §4(3) as enacted, 46 U. S. C. §1304(3), reading: "The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants." Appellants say that this was specifically directed to the outlawing of any attempts to put responsibility upon the shipper other than as defined by the Act itself, while the shipowners say that this applies only to loss or damage caused by cargo and was intended to restate existing law. In the view we take of the general provisions of the law, we need not attempt to resolve the ambiguity existing as to this specific provision.

tion. It is therefore consistent with our conclusion drawn from the general features of the Act itself.

Both the shipowners and the District Court rely heavily on the decision and principle established in *The Jason, supra*, 225 U. S. 32. There the principal question was whether a shipowner could enforce a clause in the bill of lading which required cargo owners to contribute to general average for sacrifices and expenditures incurred in a successful effort to save a negligently stranded vessel and her cargo. The issue arose because of the ruling in *The Irrawaddy*, 171 U. S. 187, to the effect that §3 of the Harter Act did not by itself change the previous law, *Ralli* v. *Troop*, 157 U. S. 386, refusing the shipowner a right to enforce contributions to general average where his own negligent navigation had made the sacrifice necessary. *The Jason* held that by contract the cargo owner *could* waive the defense available to him under the *Irrawaddy* rule; *i.e.*, the clause in the bill of lading was upheld, and the cargo owners forced to contribute. So the "Jason clause" has now become a usual part of ocean bills of lading and is recognized in the Carriage of Goods by Sea Act. §5, 46 U. S. C. §1305, last sentence.

Like all analogies, the persuasiveness of this precedent depends upon its closeness to our case. We do not think it persuasively close; it deals with a situation which—in analysis and in fact—is not to be approached as a restriction of the rights of cargo as our present agreement so clearly is. This is well pointed out by Judge Chase in *The Toluma*, 2 Cir., 72 F. 2d 690, 693, thus: "This Jason clause is not in any real sense a diminution of the rights cargo would otherwise have. On the contrary, it enables cargo to have the master as its agent at the time and place of the peril to act for it to make such sacrifices as may be timely and effective to avoid greater loss. And to secure that right, cargo agrees to contribute in general average though the Harter Act would otherwise excuse it from so doing." And when this decision was affirmed by a unanimous Court in *Aktieselskabet Ozco* v. *The Sucarseco, supra*, 294 U. S. 394, 403, Chief Justice Hughes expressed the same thought when he said that "the effect of the 'Jason clause' is to invest the master with authority and responsibility to act directly for cargo in relation to cargo's duty to contribute in general average. The master becomes for that purpose the representative of cargo." And he added: "The 'Jason clause' was sustained because it admitted the shipowner to share in general average only in circumstances where by the Harter Act he was relieved from responsibility." As is obvious, the present Act, too, does not outlaw all contracts between shipper and carrier; it strikes down only those limiting the shipper's rights. Hence the Jason clause escapes the prohibition; the Both-to-Blame clause cannot.

We conclude that the Both-to-Blame clause cannot be upheld and the interlocutory decree must be revised to eliminate the provision

for indemnity to the United States under it. Reversed. Since the appeal attacked only this portion of the decree, the latter of course stands in all other particulars.

AUGUSTUS N. HAND, *Circuit Judge* (dissenting):

I dissent on the ground that I regard the "Both-to-Blame" clause valid for the reasons stated by Judge Medina in the court below.

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 31st day of August one thousand nine hundred and fifty-one.

Present: HON. THOMAS W. SWAN, *Chief Judge;* HON. AUGUSTUS N. HAND, HON. CHARLES E. CLARK, *Circuit Judges*

UNITED STATES, AS OWNER, ETC., LIBELLANT-APPELLEE

v.

M/V ESSO BELGIUM, ETC., CLAIMANT-APPELLEE
ATLANTIC MUTUAL INS. CO., ET AL., INTERVENING-PETITIONERS-APPELLANTS

BELGIAN OVERSEAS TRANSPORTS, AS OWNER, ETC., CROSS-LIBELLANT-APPELLEE

v.

UNITED STATES, AS OWNER, ETC., PETITIONER-APPELLEE
ET AL.

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed with costs and cause remanded to revise the interlocutory decree in accordance with the opinion of this court.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL,
Clerk.

By A. DANIEL FUSARO,
Deputy Clerk.

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF NEW YORK

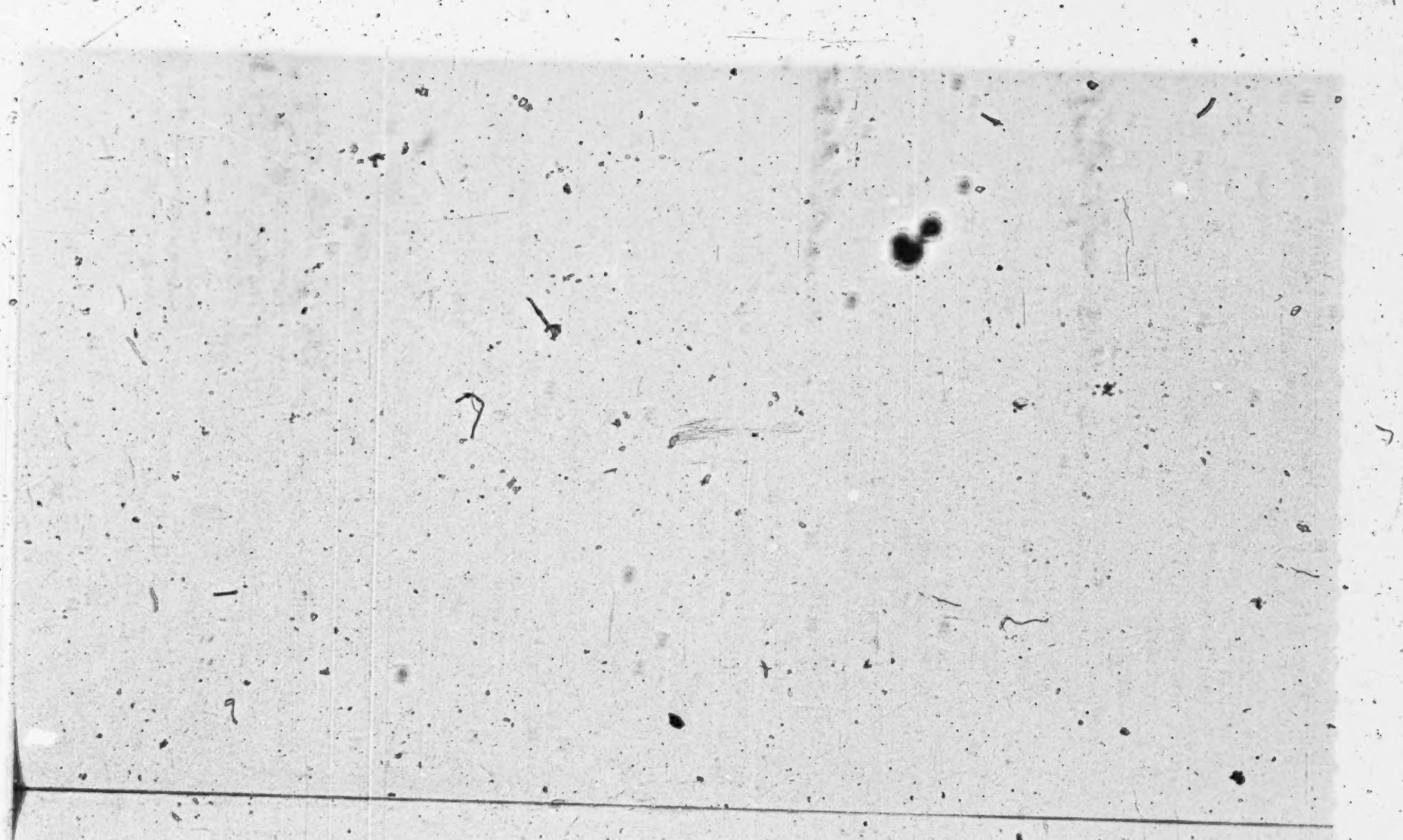
I, Alexander M. Bell, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 154, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States of America, as owner, etc., Libellant-Appellee, v. M. V. Esso Belgium, etc., Claimant-Appellee, Atlantic Mutual Insurance Company, etc., Intervening-Petitioners-Appellants; Belgian Overseas Transports, S.A., etc., Cross-Libellant-Appellee, v. United States of America, etc., Cross-Libellant-Appellee; Farr Sugar Corp., etc., Respondent-Impleaded-Appellants, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 18th day of October in the year of our Lord one thousand nine hundred and fifty-one, and of the Independence of the said United States the one hundred and seventy-sixth.

[SEAL.]

(S.) ALEXANDER M. BELL,
Clerk.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 — 972488 — 393



Supreme Court of the United States

No. 450, October Term, 1951

[Title omitted.]

Order allowing certiorari

(Filed January 14, 1952)

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

985170—52

Office-Supreme Court, U. S.
FILED
NOV 28 1951
CHARLES ELMORE CROPLEY

No. 450

In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC MUTUAL INSURANCE COMPANY, ET AL., FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	2
Statement	2
Reasons for Granting the Writ	6
Conclusion	15

CITATIONS

Cases:

Atlas, The, 93 U. S. 302	6, 8, 9
Bank of California v. *International Mercantile Marine Co.*, 64 F. 2d 97, certiorari denied, 290 U. S. 649	14
Bruce, W. W., The, 14 F. Supp. 894, reversed on other grounds, 94 F. 2d 834, certiorari denied *sub nom. Pacific-Atlantic S. S. Co.* v. *Weyerhaeuser Timber Co.*, 304 U. S. 567	7
Chattahoochee, The, 173 U. S. 540	7, 9, 13, 14
Floridian, The, 83 F. 2d 949, certiorari denied, 299 U. S. 577	15
Ikuno, K. v. *Morris & Co.*, 22 F. 2d 140, certiorari denied, 276 U. S. 626	14
Irrawaddy, The, 171 U. S. 187	11
Jason, The, 225 U. S. 32	11, 14
Knott v. *Botany Mills*, 179 U. S. 69	11
Liverpool Steam Company v. *Phenix Insurance Company*, 129 U. S. 397	10
Manitoba, The, 122 U. S. 97	8
May v. *Hamburg, etc. Gesellschaft*, 290 U. S. 333	11
New York, The, 175 U. S. 187	6
North Star, The, 106 U. S. 17	8
Railroad Company v. *Pratt*, 22 Wall. 123	10
Railway Company v. *Stevens*, 95 U. S. 655	10
Reid v. *Fargo*, 241 U. S. 544	14

Statutes:

Carriage of Goods by Sea Act (Act of April 16, 1936, 49 Stat. 1207, 46 U. S. C.) Sections 1301 *et seq.*:

Section 3	18
Section 3 (8)	5, 12
Section 4	21
Section 4 (2) (a)	7, 11, 13
Section 4 (3)	5, 12, 13

976773—51——1

Statutes—Continued Page
Harter Act (Act of February 13, 1893, 27 Stat. 445, 46 U. S. C. Sections 190–195):
Section 1 16
Section 2 16
Section 3 7, 10, 12, 13, 15, 17
Section 4 17
Miscellaneous:
24 Cong. Rec. 1291–2, 52d Cong., 2d Sess 11
Hearings before the House Committee on Merchant Marine and Fisheries, 74th Cong., 2d Sess., pp. 49–68 13
Hearings before the Senate Committee on Commerce, 74th Cong., 1st Sess., pp. 52–59, 61–63 13
Knauth, *The American Law of Ocean Bills of Lading* (1947 ed.) 176 6

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 450

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC MUTUAL INSURANCE COMPANY, ET AL., FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on August 31, 1951.

OPINIONS BELOW

The opinion of the District Court for the Southern District of New York (R. 101) is reported at 90 F. Supp. 836. The opinion of the Court of Appeals for the Second Circuit (R. 135) is reported at 191 F. 2d 370.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on August 31, 1951.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

It is standard practice for ocean bills of lading to include a provision that in the event of a collision resulting solely from the negligent navigation of both the carrier and the other vessel, the cargo owners shall indemnify the carrier against all liability to the non-carrying vessel on account of damages payable to the carrier's cargo by the non-carrying vessel.

The question presented is whether this so-called "Both-to-Blame" clause contravenes the public policy expressed in the Harter Act of 1893, and its successor, the Carriage of Goods by Sea Act of 1936.

STATUTES INVOLVED

The pertinent portions of the Harter Act (Act of February 13, 1893, 27 Stat. 445, 46 U. S. C. Sections 190–195) and of the Carriage of Goods by Sea Act (Act of April 16, 1936, 49 Stat. 1207, 46 U. S. C., Sections 1301, *et seq.*) are set forth in the Appendix, *infra,* pp. 16–24.

STATEMENT

This litigation arose out of a collision in New York Harbor between the S. S. "Nathaniel Bacon", owned by the United States, and the M. V. "Esso Belgium", owned by Belgian Overseas Transport, S. A. (R. 101–102). Both vessels and

the cargo aboard the "Nathaniel Bacon" sustained damage (R. 102).

The United States libelled the "Esso Belgium" to recover for the damage done the "Nathaniel Bacon" (R. 7). Respondent insurance companies, which had paid the "Nathaniel Bacon" cargo owners their losses, intervened as libellants to assert their subrogated rights (R. 17). A cross-libel was filed by the owners of the "Esso Belgium" to recover from the United States for the damage suffered by the "Esso Belgium" (R. 28). The damage claimed by the "Esso Belgium" included the amount of the "Esso Belgium's" liability to the cargo of the "Nathaniel Bacon". The United States therefore impleaded the cargo owners, seeking indemnity from them pursuant to the so-called "Both-to-Blame" clauses contained in the bills of lading issued by the "Nathaniel Bacon" to them (R. 40).

The libels were consolidated (R. 136) and all parties stipulated that the collision occurred through the negligence and faulty navigation of both vessels, and that no part of the loss sustained by any of the parties was the result of any fault or neglect of the shippers, consignees, owners, or insurers of cargo (R. 72). Seaworthiness of the "Nathaniel Bacon" and proper stowage of her cargo were stipulated (R. 72). It was further stipulated that the cargo owners were entitled to 100% recovery against the owners of the "Esso

Belgium" (R. 75) and that the latter were entitled to recover part of the amount of those damages from the United States, as owner of the "Nathaniel Bacon" (R. 75).[1]

The only issue remaining between the parties was whether the United States could recover from the cargo owners the damages which it would have to pay to "Esso Belgium" on account of the latter's liability to the cargo owners. It was undisputed that under Paragraph 9 of the bills of lading—the so-called "Both-to-Blame" clause—the United States was entitled to indemnity in that amount. That clause provided (R. 58) as follows:

> If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners

[1] Normally, in a both-to-blame case the damages are borne equally by the two vessels; in this case, by agreement, the damages are to be borne two-thirds by the "Esso Belgium" and one-third by the "Nathaniel Bacon".

of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier.

The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact.[1a]

The validity of the clause was thus put squarely in issue.

The district court held that the "Both-to-Blame" clause was not invalid as violative of Sections 3 (8) or 4 (3) of the Carriage of Goods by Sea Act (*infra*, pp. 18, 23) and that it did not contravene any public policy, but rather implemented the policy proclaimed by that Act and the Harter Act (*infra*, p. 16). On appeal, the judgment of the district court was reversed. The

---

[1a] As the court below pointed out (R. 137, fn. 1): "This is the form of the 'Both-to-Blame' clause which has been in use in the North Atlantic Freight Conference since Sept. 1, 1937. Robinson, Admiralty 872, 873, 1939; Knauth, Ocean Bills of Lading 95, 136, 175, 3d Ed. 1947. An earlier form in use before the passage of the Carriage of Goods by Sea Act in 1936 (see Knauth, *op. cit. supra*, at 254) was upheld in *The W. W. Bruce*, D. C. E. D. N. Y., 14 F. Supp. 894; but on appeal the court found that seaworthiness of the vessel in all respects had not been proven, thus rendering it unnecessary to consider 'the much debated legal question as to the validity of the both-to-blame collision clause.' 2 Cir., 94 F. 2d 834, 837, certiorari denied *Pacific-Atlantic S. S. Co.* v. *Weyerhaeuser Timber Co.*, 304 U. S. 567."

court of appeals held, Judge Augustus Hand dissenting, that the "Both-to-Blame" clause was invalid because it violated public policy and was not expressly authorized by any statute or judicial decision.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it has misconceived the public policy of the Carriage of Goods by Sea Act, and its predecessor the Harter Act, in a manner which seriously affects the relationship between ocean carriers and their shippers. For many years it has been common practice for these carriers to provide in their bills of lading that, in the event of a collision resulting from the negligent navigation of both the carrier and the other vessel, the shipper shall indemnify the carrier against all liability to the non-carrying vessel on account of damage to the carrier's cargo.[1] This so-called "Both-to-Blame" clause has now been declared invalid by the court below as contrary to public

[1] The "Both-to-Blame" clause is significant only in suits in the United States. Under United States law the shipper is permitted to recover 100% of his damages against the non-carrying vessel. *The Atlas*, 93 U. S. 302; *The New York*, 175 U. S. 187. Other maritime nations have adopted the rule of the Collision Convention of 1910 under which cargo can recover from the non-carrying vessel only an amount proportionate to the degree of fault of that vessel. See Knauth, *The American Law of Ocean Bills of Lading* (1947 ed.) 176.

policy.[3] The question of its validity was characterized by that court as "vastly important" (R. 135), and of such difficulty that no sure answer could be expected until this Court had passed upon it (R. 137). Although we disagree with the court of appeals' conclusion on the merits, we agree with its estimate of the importance of the question and believe with it that this case presents a particularly appropriate occasion for the exercise of this Court's discretionary review jurisdiction.

"Both-to-Blame" clauses—which today are a standard part of ocean bills of lading—came into use in response to this Court's decision in *The Chattahoochee*, 173 U. S. 540, in 1899. Section 3 of the Harter Act (Act of February 13, 1893, 27 Stat. 445, 46 U. S. C. 192, *infra*, p. 17) had made carriers by sea immune from liability to their cargo on account of negligent navigation if the carrier had exercised due diligence to make the ship seaworthy.[4] In *The Chattahoochee*, a suit arising from a both-to-blame collision, this Court held that the non-carrying vessel, which had paid

[3] The validity of the clause was upheld in *The W. W. Bruce*, 14 F. Supp. 894 (E. D. N. Y.), reversed on other grounds, 94 F. 2d 834 (C. A. 2), certiorari denied *sub nom. Pacific-Atlantic S. S. Co.* v. *Weerhaeuser Timber Co.*, 304 U. S. 567.

[4] That provision was continued in section 4 (2) (a) of the Carriage of Goods by Sea Act, Act of April 16, 1936, 49 Stat. 1207, 46 U. S. C. 1301, *et seq.* (*infra*, p. 22).

to the carrier's cargo 100% of the damages to cargo,[5] could recover from the carrier, as part of its collision damages, 50% of that amount. The effect of the decision was to make the carrier, despite Section 3 of the Harter Act, indirectly liable to its cargo for 50% of the latter's damage resulting from the carrier's negligent navigation. Thus, although the carrier was immune from liability to its cargo in case of damage resulting from negligent navigation where the carrier was wholly at fault, it was liable for 50% of those damages where it was only partly at fault. The "Both-to-Blame" clause avoids this anomalous result by allowing the carrier to recoup from its cargo any amount which the carrier has paid to the non-carrying vessel on account of damage to the carrier's cargo. As the District Court pointed out (R. 111), it implements the statutory policy of relieving the shipowner from liability to its cargo arising from negligent navigation.[6]

---

[5] It had early been established that where both vessels were to blame the cargo could recover 100% of its damages from either the carrier or the non-carrying vessel. *The Atlas*, 93 U. S. 302.

[6] Previous decisions of this Court had established the rule that in a both-to-blame collision each ship is liable for one-half of the total amount of damages. The ship suffering the lesser damage is required to pay the other one-half the difference between the amount of its damages and the amount of the other ship's damages. *The North Star*, 106 U. S. 17; *The Manitoba*, 122 U. S. 97. Under this so-called "divided damages" rule, the award of damages to cargo, in case of

The court of appeals rested its decision on the premise that the Harter and Carriage of Goods by Sea Acts reaffirmed a general public policy

collision resulting from negligent navigation of one or both vessels, is as follows:

1. Where the carrying ship is solely at fault: The cargo recovers nothing. Section 3 of the Harter Act, *infra*, p. 17.

2. Where the non-carrying vessel is solely at fault: The cargo recovers 100% of its damages from that vessel. *The Atlas*, 93 U. S. 302.

3. Where both vessels are at fault and there is no both-to-blame clause in the bill of lading, or, as under the decision below, where that clause is given no effect: The cargo recovers 100% of its damages from the non-carrier which, in turn, recovers 50% of that amount from the carrier. *The Chattahoochee*, 173 U. S. 540. (It should be noted that "recover" is used loosely here to describe the effect of the *Chattahoochee* decision. Under that decision, the non-carrier is allowed to include in its damages the amount of damages paid to cargo. Since each vessel is liable for one-half the total amount of damages to both vessels, the result in a particular case may be that there is no actual "recovery" by the non-carrier. The effect in all cases, however, is to diminish the amount due from, or increase the amount due to, the non-carrier by 50% of the amount of damage to cargo.) Thus, the cargo in effect recovers 50% of the amount of its damages from each vessel.

4. Where both vessels are at fault and there is a both-to-blame clause which is given effect: as in case 3 above, the cargo recovers 100% of its damages from the non-carrier which, in turn, recovers 50% of that amount from the carrier. The carrier, however, then recoups from cargo the amount paid to the non-carrier on account of damage to cargo. The effect is to attribute half of the damages to the fault of the non-carrying vessel and allow cargo to recover that amount, as in case 2 above. The other half is attributed to the fault of the carrying vessel and no recovery is allowed, as in case 1 above. This result is consistent both with the Harter Act and with the divided damages rule.

against contractual, as distinguished from legislative, exemptions of ocean carriers from liability for negligence. That court considered the immunity from liability for negligent navigation provided by those Acts (*infra*, pp. 17, 22) as an exception to the general policy which, as such, was to be strictly construed. It therefore held that the "Both-to-Blame" clause could not be valid unless clearly authorized by some specific provision of the Harter Act or the Carriage of Goods by Sea Act. We submit that the premise is invalid, that contractual provisions which are reasonable and not inconsistent with the policy of the Acts should be sustained, and that the consensual agreement embodied in the "Both-to-Blame" clause is wholly consistent with and, indeed, implements the policy embodied in Section 3 of the Harter Act.

It is true that prior to the passage of the Harter Act in 1893, a carrier by sea—as all carriers—was liable to a shipper for damages to cargo resulting from any cause except an act of God or the public enemy, and that numerous attempts by carriers to limit their liability by contract were struck down by the courts as contrary to public policy. *E. g., Liverpool Steam Company* v. *Phenix Insurance Company*, 129 U. S. 397; *Railway Company* v. *Stevens*, 95 U. S. 655; *Railroad Company* v. *Pratt*, 22 Wall. 123. It is

likewise true that the Harter Act was in part a codification of those judicial decisions. But in Section 3 of that Act, Congress proclaimed—with respect to liability for negligent navigation—a public policy exactly the reverse of that formerly prevailing. See 24 Cong. Rec. 1291–2, 52d Cong., 2d Sess. Where the prior law had forbidden contractual limitations on liability for negligent navigation, Section 3 made the carrier immune from such liability, provided the carrier had exercised due diligence to make the vessel seaworthy in all respects. This Court has recognized the change of policy effected by Section 3 and has given effect to bill of lading clauses designed to implement the new policy. *The Jason*, 225 U. S. 32, 55.[1]

If, then, the policy of the Harter Act is to place the risk of negligent navigation on the shipper—at least *vis-á-vis* the carrier—the "Both-to-Blame" clause can hardly be said to contravene that policy. As the District Court pointed out (R. 106), "that is exactly what the Both-to-Blame clause in substance purports to do." Since the change of policy announced by the Harter Act was continued in effect by Section 4 (2) (a) of the Carriage of Goods by Sea Act (*infra*, p. 22), and indeed was strengthened in

[1] See also *The Irrawaddy*, 171 U. S. 187, 193; *Knott* v. *Botany Mills*, 179 U. S. 69, 71, 73; *May* v. *Hamburg, etc. Gesellschaft*, 290 U. S. 333, 342–343.

one important respect,[8] there is at present no public policy with which the clause can be said to clash.[9]

Respondents' arguments that Sections 3 (8) and 4 (3) of the Carriage of Goods by Sea Act express a public policy against, or indeed specifically prohibit, the "Both-to-Blame" clause, are, as the District Court held (R. 109), unpersuasive.

Section 3 (8) provides that any contract which relieves the carrier from liability arising from "negligence, fault, or failure in the duties and obligations provided *in this section*, or lessening such liability otherwise as is provided in this Act, shall be null and void and of no effect. A benefit of insurance clause in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability." (Italics added.) When that provision is read, as it must be, in the context of the Act as a whole, it is apparent that it was not intended to cover the both-to-blame situation. The "duties and obligations provided in this section" deal only with the necessity for the carrier to provide a seaworthy

[8] The immunity afforded by Section 3 of the Harter Act was available to the carrier only if it had exercised "due diligence" to make the vessel seaworthy in all respects. The Carriage of Goods by Sea Act made the immunity unconditionally available to the carrier.

[9] The Court of Appeals found it unnecessary to decide this question since it was satisfied that neither section contained an express authorization of the "Both-to-Blame" clause.

vessel, etc., and do not touch upon his liability for negligent navigation. As already seen, the carrier is relieved by the provisions of Section 4(2)(a) from liability to his cargo for negligent navigation.

Section 4 (3) clearly has no application to the "Both-to-Blame" clause. It provides that the "shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper." The agreement expressed in a "Both-to-Blame" clause does not create any such liability of the cargo to the carrier. It simply provides that the carrier may recoup from the cargo any monies paid indirectly to cargo on account of the carrier's negligent navigation. Its effect is merely to remove an indirect liability from the carrier to the cargo which could not, under Section 3 of the Harter Act, have been asserted directly. Moreover, when Section 4 (3) was before Congress, it was proposed that it be amended to outlaw specifically the "Both-to-Blame" clause. The proposal was rejected. See Hearings before the Senate Committee on Commerce on S. 1152, 74th Cong., 1st Sess., pp. 52–59, 61–63; Hearings before the House Committee on Merchant Marine and Fisheries on S. 1152, 74th Cong., 2d Sess., pp. 49–68.

Nor is there any policy expressed in the decisions of this Court or other federal courts with which the clause is in conflict. *The Chatta-*

hoochee, 173 U. S. 540, held only that Section 3 of the Harter Act did not affect the liability of an ocean carrier for faulty navigation except to its own cargo. Consequently, this Court allowed recovery by one vessel against another after a both-to-blame collision and allowed the non-carrying vessel to recover as part of its damages 50% of the amount it had paid as damages to the cargo of the carrying vessel. In so holding, this Court emphasized that its decision was concerned solely with "the relations of the two colliding vessels to each other" (173 U. S. at 555). The "Both-to-Blame" clause does not affect that relationship; it is concerned solely with the relationship between carrier and cargo.

Indeed, the decision below seems inconsistent with this Court's decision in *The Jason, supra* (225 U. S. 32), which upheld, against a challenge based on the Harter Act, a provision in a bill of lading which required a shipper to contribute to general average in case of peril resulting from the carrier's negligent navigation.[10] This Court

[10] Other examples of contractual clauses limiting the carrier's liability or inhibiting the assertion by the cargo of that liability which have been upheld by the courts are: clauses limiting liability to a stipulated amount in the absence of a declared higher value, *Reid* v. *Fargo*, 241 U. S. 544; clauses limiting the time in which suit must be brought, *K. Ikuno* v. *Morris & Co.*, 22 F. 2d 140 (C. A. 4), certiorari denied, 276 U. S. 626, or limiting the time in which notice of claim must be made, *Bank of California* v. *International Mercantile Marine Co.*, 64 F. 2d 97 (C. A. 2), certiorari denied, 290 U. S. 649; clauses relieving the carrier from lia-

relied specifically on Section 3 of the Harter Act and pointed out that, although Section 3 did not *ex propia vigore* require contribution from cargo, it expressed a policy which permitted the shipowner to require contribution in the contract. The Court stated its holding in laguage as applicable here as there (pp. 55–56); "* * * since the clause contained in the bills of lading * * * admits the shipowner to share in the general average only under circumstances where by the act he is relieved from responsibility, the provision in question is valid * * *." Similarly, since the "Both-to-Blame" clause gives the carrier a right of recoupment only under circumstances where the Act relieves it of liability, it is a permissible consensual implementation of the Act's policy.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER 1951.

---

bility for unseaworthiness not discoverable by the exercise of due diligence, *The Floridian*, 83 F. 2d 949 (C. A. 2), certiorari denied, 299 U. S. 577.

APPENDIX

1. The pertinent portions of Sections 1–4 of the Harter Act (Act of February 13, 1893, 27 Stat. 445, 46 U. S. C. Secs. 190–193) provide as follows:

> SEC. 1. It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.
>
> SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully

handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

SEC. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

SEC. 4. That it shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such

document shall be prima facie evidence of the receipt of the merchandise therein described.

2. Sections 3 and 4 of the Carriage of Goods by Sea Act of 1936 (Act of April 16, 1936, 49 Stat. 1207, 1208–10, 46 U. S. C. Sec. 1301, 1303, 1304) provide as follows:

> SEC. 3 (1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—
>
> (a) Make the ship seaworthy;
>
> (b) Properly man, equip, and supply the ship;
>
> (c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.
>
> (2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.
>
> (3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—
>
> (a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.
>
> (b) Either the number of packages or pieces, or the quantity or weight, as the

case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: *Provided,* That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3) (a), (b), and (c), of this section: *Provided,* That nothing in this Act shall be construed as repealing or limiting the application of any part of the Act, as amended, entitled "An Act relating to bills of lading in interstate and foreign commerce", approved August 29, 1916 (U. S. C., title 49, secs. 81–124), commonly known as the "Pomerene Bills of Lading Act."

(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at

the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided*, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

(7) After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading: *Provided*, That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the

issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

SEC. 4. (1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided,* That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden

of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this Act or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however,* That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Pro-*

vided, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

U. S. GOVERNMENT PRINTING OFFICE: 1981

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
FEB 25 1952
CHARLES ELMORE CROPLEY
CLERK

No. 450

In the Supreme Court of the United States

OCTOBER TERM, 1951

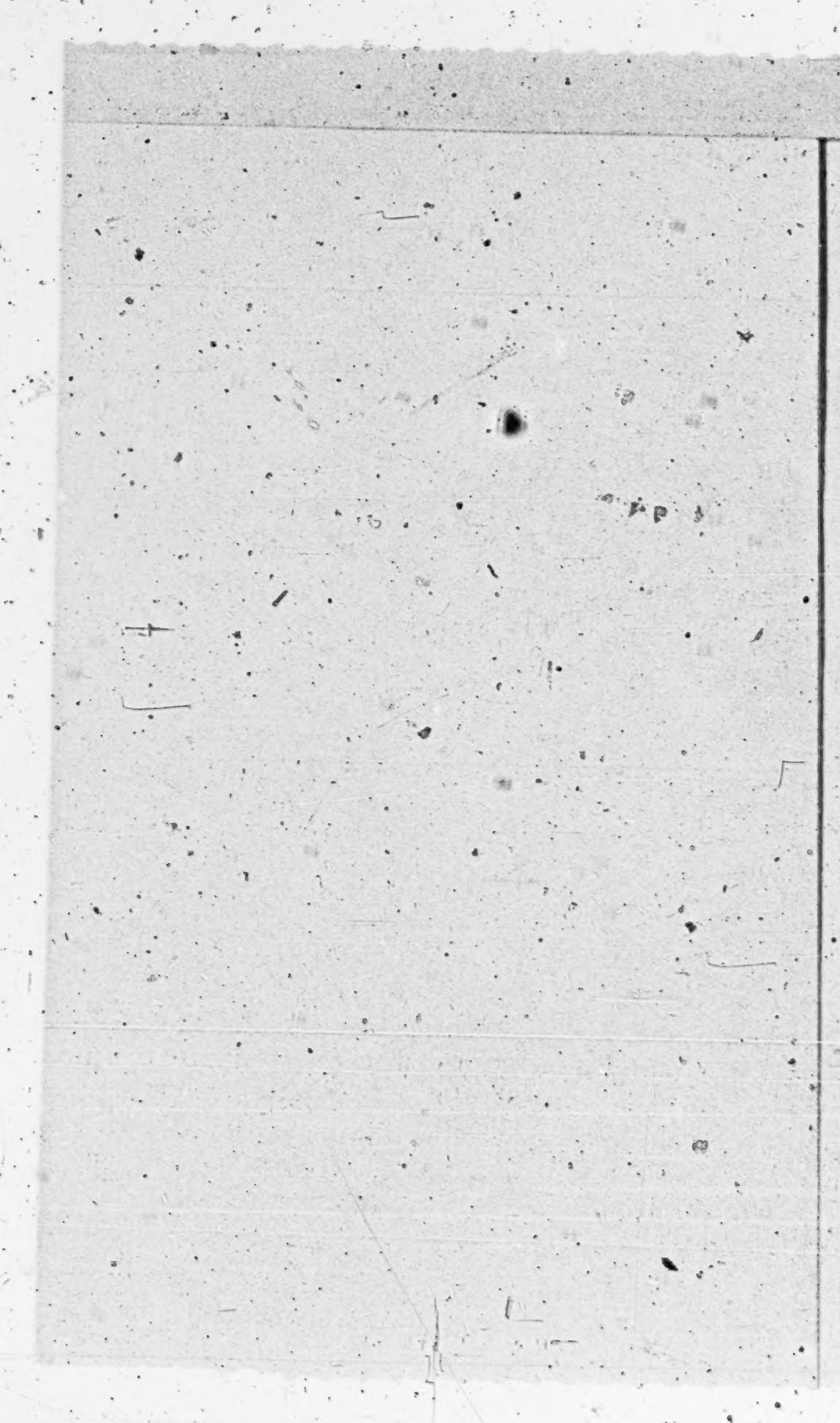
UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC MUTUAL INSURANCE COMPANY, FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES



INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	3
Statement	3
Specification of errors to be urged	6
Argument:	
Introduction and summary	6
I. The statutory and decisional framework within which the "Both-to Blame" clause operates	11
A. The "Both-to-Blame" clause	11
B. The Harter Act	14
C. The Carriage of Goods by Sea Act	19
II. Neither Section 3(8) nor Section 4(3) of the Carriage of Goods by Sea Act prohibits the "Both-to-Blame" clause	23
III. The "Both-to-Blame" clause does not offend any applicable public policy; it is consistent with and implements the policy expressed in pertinent federal legislation	30
A. Since the Harter Act, no public policy requires that the carrier bear the loss or damage resulting to cargo from errors or faults of navigation	30
B. The statutes permit enforcement of contractual stipulations not inconsistent with their terms, including stipulations limiting cargo's preexisting rights	34
C. The "Both-to-Blame" clause is a reasonable means of implementing the congressional policy of relieving the carrier from liability to its cargo for errors and faults of navigation	40
Conclusion	45
Appendix	46

CITATIONS

Cases:

Aktieselskabet Cusco v. *The Sucarseco*, 294 U.S. 394, 12, 25, 37, 38

Allanwilde Transport Corp. v. *Vacuum Oil Co.*, 248 U.S. 377 38

Atlas, The 93 U.S. 302 ..... 7, 11, 12, 40, 41, 42, 43

Bamfield v. *Goole & Sheffield Transport Co.* [1910], 2 K.B. 94 26

Cases—Continued

	Page
Bank of California v. *International Mercantile Marine Co.*, 64 F. 2d 97, certiorari denied, 290 U.S. 649	38
Brass v. *Maitland*, 6 El. and Bl. 470, 119 Eng. Rep. 940	26
Calderon v. *Atlas Steamship Co.*, 170 U.S. 272	25
Carib Prince, The, 170 U.S. 655	39
Chattahoochee, The, 173 U.S. 540	7, 12, 13, 40, 41, 42, 43
Chicago, B. & Q. R. Co. v. *McGuire*, 219 U.S. 549	39
Compania La Flecha v. *Brauer*, 168 U.S. 104	33
Delaware, The, 161 U.S. 459	15
Floridian, The, 83 F. 2d 949, certiorari denied, 299 U.S. 577	39
Germanic, The, 124 Fed. 1	25
Great Lakes Transit Corp. v. *Interstate S. S. Corp.*, 301 U.S. 646	44
Great Northern Railway Co. v. *L.E.P. Transport and Depository Limited* [1922], 2 K.B. 742	26
Ikuno, K. v. *Morris & Co.*, 22 F. 2d 140, certiorari denied, 276 U.S. 626	38
Irrawaddy, The, 171 U.S. 187	9, 25, 33, 34-35
Isis, The (*May* v. *Hamburg Etc. Gesellschaft*), 290 U.S. 333	22
Jason, The, 225 U.S. 32	8, 9, 25, 33, 34, 35, 36, 37, 38
Knott v. *Botany Mills*, 179 U.S. 69	33
Liverpool Steam Co. v. *Phenix Insurance Co.*, 129 U.S. 397	14, 31
Luchenbach v. *McGahan Sugar Co.*, 248 U.S. 139	24
Macnamara & Son v. *"Hatteras,"* 33 Ll. L. Rep. 233 (Admiralty Division, Irish Free State)	25
May v. *Hamburg-Amerikanische Etc. Gesellschaft*, 290 U.S. 333	22, 33, 37
North Star, The, 106 U.S. 17	4, 11
Pacific-Atlantic S. S. Co. v. *Weyerhaeuser Timber Co.*, 304 U.S. 567	6
Phoenix Insurance Co. v. *Erie & Western Transportation Co.*, 117 U.S. 312	24
Prussia, The, 93 Fed. 837, certiorari denied, 174 U.S. 803	39
Railroad Co. v. *Pratt*, 22 Wall. 123	14
Railway Co. v. *Stevens*, 95 U.S. 655	14
Reid v. *Fargo*, 241 U.S. 544	38
Schooner Catherine, The v. *Dickinson*, 17 How. 170	11
St. Hubert, The, 107 Fed. 727, certiorari denied, 181 U.S. 621	38
Switzerland General Ins. Co. v. *Navigazione Libera Triestina*, 91 F. 2d 960	38
Turret Crown, The 297 Fed. 766, certiorari denied, 264 U.S. 591	24

Statutes:

	Page
Carriage of Goods by Sea Act of 1936 (Act of April 16, 1936, 49 Stat. 1207, 46 U.S.C. 1301, *et seq.*):	20
Section 1(a)	26
Section 3	21, 24, 48
Section 3(1)	21, 48
Section 3(2)	48
Section 3(3)	26, 48
Section 3(4)	49
Section 3(5)	26, 49
Section 3(6)	21, 50
Section 3(7)	26, 51
Section 3(8)	10, 21, 23, 24, 26, 32, 51
Section 4	52
Section 4(1)	52
Section 4(2)	39, 52
Section 4(2)(a)	12, 21, 24
Section 4(2)(i)	26
Section 4(2)(q)	21
Section 4(3)	10, 23, 25, 26, 27, 53
Section 4(4)	53
Section 4(5)	21, 26, 54
Section 4(6)	26, 54
Section 5	26
Section 6	26
Section 7	26
Section 9	26
Section 11	26
Section 13	20
Harter Act (Act of February 13, 1893, 27 Stat. 445, 46 U.S.C. 190-195):	14, 46
Section 1	15, 25, 46
Section 2	15, 46
Section 3	8, 11, 12, 16, 21, 33, 39, 47
Section 4	15, 47
Section 5	16
Brussels Convention of 1924 (Hague Rules), U. S. Treaty Series No. 931, 51 Stat. 233, ratified, 51 Stat. 246.	9, 19, 26

Miscellaneous:

1 Benedict, *Admiralty* (6th ed.), pp. 296-297	34
24 Cong. Rec.:	
pp. 147-149	15, 16
p. 1180	17
pp. 1291-2	17-18
Hearings, House Committee on Merchant Marine and Fisheries, on S. 1152, 74th Cong., 1st Sess.	20, 21, 27, 28

Miscellaneous—Continued

Page

Hearings, Senate Committee on Commerce, on S. 1152, 74th Cong., 1st Sess. 20, 26, 27, 28, 29
H. Rep. 1988, 52d Cong., 1st Sess. 15
H. Rep. No. 2218, 74th Cong., 2d Sess.:
pp. 1-3 ..... 20, 28
pp. 4-7 19
pp. 6-9 20
H. R. 9176, 52d Cong. 15
Knauth, *The American Law of Ocean Bills of Lading* (1947 ed.):
p. 87 5
pp. 107-111 15
p. 124 19
p. 176 11
S. Rep. No. 742, 74th Cong., 1st Sess., pp. 3-4 ..... 19, 20, 28
WSA, General Order 16, July 6, 1942, 7 F.R. 5246, as amended, 46 C.F.R. (Cum. Supp.) Sec. 306.11 5

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 450

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC MUTUAL INSURANCE COMPANY, FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court for the Southern District of New York (R. 101) is reported at 90 F. Supp. 836. The opinion of the Court of Appeals for the Second Circuit (R. 135) is reported at 191 F. 2d 370.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on August 31, 1951 (R. 148). The petition for a writ of certiorari was filed

on November 28, 1951. Certiorari was granted on January 14, 1952 (R. 151). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Carriage of Goods by Sea Act, and its predecessor the Harter Act, provide that an ocean carrier shall not be liable to its cargo for damage to cargo resulting from error or fault in the carrier's navigation. Under long-standing judicial decisions, however, where the damage results from a collision in which two vessels are both at fault, the cargo can recover 100% of its damages from the non-carrying vessel which in turn can recover 50% of that amount from the carrier. The effect of the two rules is that although the carrier, if solely at fault, is not liable to its cargo, where it is only partially at fault it is liable, indirectly, for half of the damages to its cargo. In order to avoid that result, it has become standard practice for ocean bills of lading to provide that, in the event of a collision resulting both from faulty navigation of the carrier and the fault of the other vessel, the cargo owner shall indemnify the carrier against such portion of its liability to the non-carrying vessel as represents damages payable to the carrier's cargo by the non-carrying vessel.

The question presented is whether this so-called "Both-to-Blame" clause is prohibited by, or contravenes the public policy expressed in, the Harter Act of 1893 and its successor the Carriage of Goods by Sea Act of 1936.

STATUTES INVOLVED

The pertinent portions of the Harter Act (Act of February 13, 1893, 27 Stat. 445, 46 U.S.C. 190-195) and of the Carriage of Goods by Sea Act (Act of April 16, 1936, 49 Stat. 1207, 46 U.S.C. 1301, *et seq.*) are set forth in the Appendix, *infra*, pp. 46-55.

STATEMENT

These are consolidated suits tried on stipulated facts. They arise out of a collision in 1942 in New York Harbor between the S. S. "Nathaniel Bacon", owned and operated by the United States,[1] and the M.V. "Esso Belgium", owned by Belgian Overseas Transports, S. A., a Belgian corporation (R. 28-29). Both vessels and the cargo aboard the "Nathaniel Bacon" sustained damage (R. 102).

The United States libelled the "Esso Belgium" to recover for the damage done the "Nathaniel Bacon" (R. 7). Certain insurance companies, as subrogees to the owners of cargo carried on the "Nathaniel Bacon", intervened as libellants to assert against the "Esso Belgium" a claim for damage or loss to such cargo (R. 17). A cross-libel was filed by the owners of the "Esso Belgium" to recover from the United States for the damage suffered by the "Esso Belgium" (R. 28), including any liability it might have incurred to the cargo

[1] The vessel was operated by the War Shipping Administration through an agency agreement; in thus operating the vessel, the War Shipping Administration was engaged as a common carrier in the commercial carriage of goods by sea for hire (R. 77).

of the "Nathaniel Bacon" (R. 35-36). The United States thereupon impleaded those cargo owners, seeking indemnity from them pursuant to the so-called "Both-to-Blame" clauses contained in the bills of lading issued to them (R. 40).

It was stipulated (R. 71-78) that the collision occurred through the negligence and faulty navigation of both vessels, and that no part of the loss sustained by any of the parties was the result of any fault or neglect of the shippers, consignees, owners, or insurers of cargo (R. 72). Seaworthiness of the "Nathaniel Bacon" and proper stowage of her cargo were stipulated (R. 72). It was further stipulated that the cargo owners were entitled to full recovery from the owners of the "Esso Belgium" (R. 75) and that the latter were entitled to recover part of the amount of those damages from the United States, as owner of the "Nathaniel Bacon" (R. 75).[2]

The only issue remaining was whether the United States could recover from the cargo owners the amount of the liability which it incurred to the "Esso Belgium" on account of damages paid by the latter to the cargo owners. It was undisputed that

[2] Where both vessels are to blame the American courts divide the damages equally. *The North Star*, 106 U.S. 17. On occasion, however, the parties, in an effort to settle some or all of the issues without the necessity of trial, stipulate for a different percentage, thus discounting the possibility that one vessel might be held solely at fault. In this case, by agreement among both vessels and the cargo of the "Nathaniel Bacon", the damages are to be borne two-thirds by the "Esso Belgium" and one-third by the "Nathaniel Bacon." (R. 119; see R. 80.)

Paragraph 9 of the bills of lading—the so-called "Both-to-Blame" clause—provides for such indemnity. That clause reads (R. 58) as follows:

> If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier.
>
> The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contract.[3]

---

[3] The clause was in the standard form prescribed by the War Shipping Administration. See WSA, General Order 16, July 6, 1942, 7 F.R. 5246, as amended, 46 C.F.R. (Cum. Supp.) Sec. 303.11. See also Knauth, *Ocean Bills of Lading* (1947 ed.), p. 87.

As the court below pointed out (R. 137, fn. 1): "This is the form of the 'Both-to-Blame' clause which has been in use in the North Atlantic Freight Conference since Sept. 1, 1937. Robinson, *Admiralty* 872, 873, 1939; Knauth, *Ocean Bills of Lading* 95, 136, 175, 3d Ed. 1947. An earlier form in use before the passage of the Carriage of Goods by Sea Act in 1936 (see Knauth, *op. cit. supra*, at 254) was upheld in the

The validity of the clause was thus put squarely in issue. The District Court (Judge Medina) held that the "Both-to-Blame" clause was not invalid as violative of Sections 3(8) or 4(3) of the Carriage of Goods by Sea Act (*infra*, pp. 51, 53), and that it did not contravene any public policy but rather implemented the policy proclaimed by that Act and the Harter Act (*infra*, p. 46). On appeal, the judgment of the District Court was reversed. The Court of Appeals (Judges Clark and Swan, Judge Augustus Hand dissenting), held that the "Both-to-Blame" clause was invalid because it violated public policy and was not expressly authorized by any statute or judicial decision.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the "Both-to-Blame" clause is contrary to public policy.

2. In failing to enforce the "Both-to-Blame" clause.

3. In failing to affirm the judgment of the District Court.

ARGUMENT

Introduction and Summary

The Harter Act and the Carriage of Goods by Sea Act make ocean carriers immune from liability

---

W. W. Bruce, D.C.E.D.N.Y., 14 F. Supp. 894; but on appeal the court found that seaworthiness of the vessel in all respects had not been proven, thus rendering it unnecessary to consider 'the much debated legal question as to the validity of the both-to-blame collision clause.' 2 Cir., 94 F. 2d 834, 837, certiorari denied *Pacific-Atlantic S. S. Co.* v. *Weyerhaeuser Timber Co.*, 304 U. S. 567."

to their cargo for damages resulting from fault in navigation. Where, however, the cargo is damaged as the result of a collision caused by the faulty navigation of the carrier and the fault of another vessel, the cargo can recover its full damages from the non-carrying vessel (*The Atlas*, 93 U.S. 302) which can in turn recover half of that amount from the carrier. *The Chattahoochee*, 173 U.S. 540. The effect of these statutory and judicial rules, taken together, is that where damage to cargo results from a collision caused solely by the carrier, the carrier is not liable, but where the damage is caused only in part by the carrier, it is indirectly liable for half the amount of the cargo damages. The result is obviously anomalous. The "Both-to-Blame" clause, customarily inserted in ocean bills of lading, is designed to avoid that anomaly by affording the carrier the same, but no greater, relief from responsibility to its cargo where partly at fault as it enjoys by express statutory provision where solely at fault. This it does by requiring cargo to repay to the carrier any amount which cargo has in effect recovered from its carrier as the result of the rules stated above.

The contractual provision embodied in the "Both-to-Blame" clause should be upheld unless prohibited by statute or contrary to public policy. We contend that the clause is not so prohibited; and that, far from being contrary to public policy, the clause is consistent with and supported by that policy as declared by Congress.

We believe that the majority in the Court of Appeals erred in at least three principal respects: First, it erred in considering the issue to be whether the courts should "fill in an asserted gap" inadvertently left by Congress in the legislative scheme (R. 137). This overlooks the fact that Congress, while establishing legislative uniformity as to the matters which it specified, did not attempt to prescribe all the provisions of a bill of lading. Within the framework which Congress established, the parties remain free to prescribe their mutual rights and liabilities. The court is not called upon to fill a legislative gap by prescribing the parties' rights and obligations, but simply to enforce a contract. Accordingly, our burden is not to persuade the Court that the statutes expressly authorize the indemnity here sought; it is only to persuade the Court that the problem is one on which the parties are free to contract. Cf. *The Jason*, 225 U.S. 32.

In the second place, we think the majority in the Court of Appeals misconceived the statutory policy. To establish that the "Both-to-Blame" clause was contrary to public policy, Judge Clark relied on decisions prior to the Harter Act which held that a carrier may not by contract avoid his liability for negligence. In thus relying on judicial notions of public policy, the court below failed, we believe, to give effect to the contrary policy declared by Congress. For in Section 3 of the Harter Act, Congress established the principle that if the shipowner had exercised due diligence to make a

vessel seaworthy and to man and equip her properly, and had fulfilled his duties of proper stowage and care of cargo, he had discharged all the obligations which it was reasonable to place upon him and should not be held liable for cargo damage or loss resulting from errors in navigation. That principle won international acceptance in the so-called Hague Rules, which were embodied in the Brussels convention of 1923, in our Carriage of Goods by Sea Act of 1936, and in similar legislation in all leading maritime nations.

This Court has often recognized the fundamental change in policy thus made by Congress, and has pointed to the duty of the courts "to conform in their decisions to the policy so declared." *The Irrawaddy,* 171 U.S. 187, 193; *The Jason, supra.* Pre-Harter Act decisions regarding negligence clauses are therefore wholly superseded, as to errors of navigation, by the statutory policy of immunity.

Finally, we believe the unwillingness of the court below to give full force to the legislative change in policy reflects another misconception as to the nature of the federal legislation. It seems to have treated that legislation as "remedial legislation" obtained by and enacted in the interest of shipowners; accordingly it was reluctant to sustain a contractual limitation of liability which Congress had not expressly authorized for fear lest "what is lost in the legislative halls may be granted by courts in the guise of 'interpretation'" (R. 137).

In fact, however, the shoe is on the other foot.

The impetus for the Harter Act came from American shippers, who sought to curb objectionable practices of British shipowners. And the Carriage of Goods by Sea Act was supported not alone by shipowners, but with at least equal vigor by shippers, cargo underwriters, bankers and other interests.

During the legislative consideration of the bill which became the Carriage of Goods by Sea Act, cargo underwriters proposed an amendment specifically outlawing the "Both-to-Blame" clause. The merits and legality of the clause were extensively argued, pro and con; the shipowners' representative emphatically stated that the proposed amendment was not part of the plan upon which divergent interests had all agreed and that if it were adopted the shipowners would withdraw their support and oppose passage of the bill. The proposed amendment was not adopted by either Committee and the bill was presented to Congress with the statement that it had the support of all interested parties. We believe this history completely dispels any possible inference from the lack of specific congressional authorization of the clause.

We shall in the first point of our brief sketch the function and effect of the "Both-to-Blame" clause and the situation to which it is addressed, and the underlying statutory framework of the Harter Act and the Carriage of Goods by Sea Act. We shall then show that neither § 3(8) nor § 4(3) of the Carriage of Goods by Sea Act, relied on by re-

spondents, forbids the clause expressly or by implication. Finally, we shall show that no consideration of public policy, as reflected in the statutes and in this Court's decisions, requires the "Both-to-Blame" clause to be struck down.

I

The Statutory and Decisional Framework Within Which the "Both-to-Blame" Clause Operates

A. *The "Both-to-Blame" Clause.*

The "Both-to-Blame" clause—which today is a standard provision of ocean bills of lading—can be properly appraised only as a natural outgrowth of the body of law regulating the liability of ocean carriers for negligent navigation in collision cases. The clause is of significance only under American law because the rule of law to which it responds does not exist in the law of other maritime nations.[4]

It was early established that in case of a collision in which both vessels were at fault, cargo could recover 100% of its damages from either vessel (*The Atlas*, 93 U.S. 302), and that, in such a collision, the total amount of the vessels' damages should be divided equally between them. *The Schooner Catherine* v. *Dickinson*, 17 How. 170; *The North Star*, 106 U.S. 17. In 1893, the Harter Act, by Section 3 (Appendix, *infra*,

---

[4] Other maritime nations have adopted the rule of the Collision Convention of 1910 under which cargo can recover from the noncarrying vessel only an amount proportionate to the degree of fault of that vessel. See Knauth, *The American Law of Ocean Bills of Lading* (1947 ed.), 176.

p. 47), provided that if the carrier had exercised "due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied," it was not to be liable to its cargo for damage resulting from negligent navigation. Section 4(2)(a) of the Carriage of Goods by Sea Act continues the immunity thus granted. Shortly after the enactment of the Harter Act, this Court, in *The Chattahoochee,* 173 U.S. 540, reaffirmed the divided damages rule and held further that a noncarrying vessel could recover from the carrier, as part of its damages, one-half of the amount of damages it had paid to the carrier's cargo. See also *Aktieselskabet Cuzco* v. *The Sucarseco,* 294 U.S. 394.

After the decision in *The Chattahoochee,* therefore, the award of damages to cargo in cases of collision resulting from negligent navigation of one or both vessels has been as follows (the "Both-to-Blame" clause aside):

1. Where the carrying ship is solely at fault: The cargo recovers nothing. Section 3 of the Harter Act, *infra,* p. 47.

2. Where the noncarrying vessel is solely at fault: The cargo recovers 100% of its damages from that vessel. *The Atlas,* 93 U.S. 302.

3. Where both vessels are at fault: The cargo recovers 100% of its damages from the noncarrier which in turn recovers 50% of that amount from

the carrier. *The Chattahoochee, supra.*[5] Thus, in effect, each vessel is made responsible for 50% of the amount of the damages suffered by cargo.

The anomalous result is thus obtained that while a carrier, in the event of a collision in which it was wholly at fault, pays its cargo nothing, yet in the event of a collision in which it was only partly at fault, it is required to bear 50% of its cargo's damage.

It was, as the District Court pointed out (R. 103), in response to this anomaly that the "Both-to-Blame" clause was inserted in ocean bills of lading. If the "Both-to-Blame" clause is given effect, the result where one vessel is wholly at fault is not changed. (See cases 1 and 2 above). Where, however, both vessels are at fault, as in case 3 above, the cargo recovers 100% of its damages from the non-carrier which in turn recovers 50% of that amount from the carrier. The carrier, however, then recoups from cargo, pursuant to the clause,

---

[5] It should be noted that "recover" is used loosely here to describe the effect of *The Chattahoochee* decision. Under that decision, the non-carrier is allowed to include in its damages the amount of damages paid to cargo. Since each vessel is liable for one-half the total amount of damages to both vessels, the result in a particular case may be that there is no actual "recovery" by the noncarrier. The effect in all cases, however, is to diminish the amount due from, or increase the amount due to, the noncarrier by 50% of the amount of damage to cargo.

As the present case illustrates (*supra*, p. 4), the damages may by stipulation be divided on some basis other than 50-50. Such a different division of damages between the two vessels involved does not affect the principle or practical effect of the "Both-to-Blame" clause.

the amount paid to the noncarrier on account of damage to cargo. The only effect of the clause is thus to give the carrier the same (but no greater) immunity in a mutual fault situation as it has by statute where it is solely at fault, while in no way interfering with cargo's recovery and retention of that portion of the damages for which the noncarrier is ultimately responsible.

B. *The Harter Act*

The Harter Act, enacted in 1893 (27 Stat. 445, 46 U.S.C. 190-195; *infra*, p. 46) was the first effort by Congress to prescribe to some extent the respective rights and liabilities of shipper and carrier. Prior to its enactment that relationship was governed by contract and decisional law. Shipowners, particularly British shipowners, customarily included in bills of lading a large number of provisions exonerating them from liability in various circumstances. Such provisions were generally upheld by the British courts. The American courts, however, applied to carriers by sea, as to all carriers, the rule of liability for all damages attributable to the fault or neglect of the carrier or its agents, and repeatedly struck down, as contrary to public policy, contractual provisions limiting the carrier's liability for such damages. E.g., *Liverpool Steam Co.* v. *Phenix Insurance Co.*, 129 U.S. 397; *Railway Co.* v. *Stevens*, 95 U.S. 655; *Railroad Co.* v. *Pratt*, 22 Wall. 123.

The Harter Act was sought by American shippers. The bill, H.R. 9176, 52d Cong., was introduced in the House of Representatives for the avowed purposes of affirming the judicially developed restraints on contractual limitation of carriers' liability, and of making those restraints effective in cases where bills of lading issued abroad by foreign carriers would otherwise not be subject to our laws. Specifically, the complaint was that British carriers, who had a virtual monopoly of the ocean trade between the United States and foreign ports, were, by virtue of their monopoly position, forcing American shippers to acquiesce in limitations of liability which, in fact, denuded shippers of any protection. See H. Rep. 1988, 52d Cong., 1st sess.; 24 Cong. Rec. 147-149.[6]

To this end, Sections 1 and 2 of the Act (*infra*, pp. 46-47) declared null and void any provision of a bill of lading (1) relieving the carrier of liability for negligence, fault or failure in loading, stowage, custody, care, or delivery of freight, or (2) lessening, weakening, or avoiding the shipowner's obligation to exercise due diligence in equipping, manning, provisioning, and outfitting the vessel and making it seaworthy. These prohibitions were made applicable to any vessel transporting merchandise or property from or between ports of the United States and foreign ports. Section 4

[6] "The exigencies which led to the passage of the act" are discussed in *The Delaware*, 161 U. S. 459, 472. See also Knauth, *Ocean Bills of Lading* (1947 ed.), pp. 107-111.

required the owner, master, or agent to issue a bill of lading containing certain prescribed information and made that document prima facie evidence of the receipt of the goods described in it. By Section 5 the agent, owner, or master of a vessel guilty of violating any provision of the Act was made liable to a fine not exceeding $2,000; the fine was a lien on the vessel for which it could be libelled in any district court within whose jurisdiction it was found.

In imposing these obligations on carriers, Congress also, in Section 3 of the Act, relieved the carrier of liability for faults of navigation. As introduced, Section 3 provided only that shipowners should not be liable for "error of judgment in navigation * * * if navigated with ordinary skill and care."[7] In the Senate, however, Section

[7] The entire text of Section 3, as introduced, is as follows:

SEC. 3. That if any vessel transporting merchandise or property between ports in the United States of America and foreign ports shall, on starting on her voyage, be in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or master shall become or be held responsible for damage or loss resulting from error of judgment in navigation or in the management of said vessel, if navigated with ordinary skill and care, from the time of her leaving her usual place of loading on her intended voyage until her arrival at the usual place of discharge at her port of delivery, nor shall the owner or owners, the vessel, or master be held liable for losses arising from dangers of the sea, acts of God, or public enemies, or in saving life, and it may be stipulated in bills of lading and shipping receipts that the vessel may render services to property in distress afloat and tow same to the nearest and most convenient port of safety without incurring penalties from deviation in rendering such service. [24 Cong. Rec. 147.]

3 was drastically amended to read as it was finally enacted. As changed, it provided, as we have shown above, that carriers, if they had exercised due diligence to make the vessel seaworthy, were not to be liable to their cargo for damage resulting from negligent navigation. The reasons for the Senate change were thus explained to the House by Mr. Lind, who was in charge of the bill:[8]

> Mr. LIND. One important new feature is presented by the Senate amendments. As the law now stands American vessels are subjected to certain hardships, from which they can not exempt themselves by contract or otherwise, to which foreign vessels are not subjected. A foreign vessel, of course, can contract with a shipper, and make provision against any liability on its own part for the negligence of its masters or owners; but the object of this bill is to limit this right. An American vessel can not make any such contract, or absolve itself from any such liability, for the reason that it is always amenable to the Federal courts, and the Federal courts have always held that contracts of that character are again public policy.
>
> Those who are more familiar with the matter of ocean navigation than I—especially the gentleman from Maine [Mr. DINGLEY]—have agreed with me, as it was well demonstrated in the Senate committee at the hearings which I

[8] The Senate Committee made no written report on the bill and the debates in the Senate do not discuss the reason for the change. Extensive hearings were held on the bill by the Senate committee (see 24 Cong. Rec. 1180) but apparently no transcript was kept.

attended, that the law as applicable to shipping in the United States ought to be somewhat more liberal than it is at present. Now, after a master, owner, or charterer has taken every precaution that human ingenuity can suggest in equipping, manning, and in furnishing his vessel, nevertheless, if out on the high seas in stress of weather or in storms, when every man is worn out with watching, if a man falls asleep on the watch or commits any fault of navigation whereby injury results, the master, owner, or charterer is held responsible under the law.

To this extent the bill relieves domestic shipping from these burdens. It provides that when the owner or owners, the charterers or the master have exercised due diligence in properly equipping, manning, and stowing, making the vessel in all respects seaworthy—

Mr. DINGLEY. And properly navigating.

Mr. LIND. And properly navigating, then they shall not be liable for faults or errors of navigation solely. [24 Cong. Rec. 1291-2, 52d Cong., 2d Sess.]

Congress thus recognized that however diligent the shipowner might be in preparing the vessel for the voyage, once the vessel has left shore vessel and cargo are inevitably exposed to common perils beyond the direct control of either shipowner or cargo. It regarded errors and faults of navigation as one of those inevitable perils inherent in the nature of ocean shipping, doubtless recognizing that to require the carrier to bear the loss resulting

from such errors would not reduce the likelihood of loss but would merely cause this element of transportation cost to be reflected in higher freight rates.

Thus Congress established, in the Harter Act, a broad scheme for the division of risks between cargo and carrier. On the one hand it defined certain essential duties to which it felt shipowners should be subject; it forbade avoidance of those duties by contract and it sought to make that prohibition effective against foreign shipowners. On the other hand Congress, having in mind the peculiar nature of ocean commerce and the need to encourage investment in shipping, determined to relieve carriers of liability for errors or faults of navigation.

C. *The Carriage of Goods by Sea Act.*

This scheme of division of risks first embodied in the Harter Act won international acceptance in the so-called "Hague Rules" which were drafted at a meeting of the International Law Association in August 1921 and (with minor changes) became the Brussels Convention of 1924, signed by 24 nations, including the United States. Ratification of the Convention was advised and consented to by the Senate in April, 1935, but was not deposited until June 25, 1937. 51 Stat. 233; See H. Rep. No. 2218, 74th Cong., 2d sess., pp. 4-7; S. Rep. 742, 74th Cong., 1st sess., p. 4; Knauth, *Ocean Bills of Lading* (1947 ed.), p. 124. Meanwhile Congress, effec-

tive July 15, 1936, enacted the provisions of the Convention, with certain modifications not here material,[9] as the Carriage of Goods by Sea Act, 49 Stat. 1207, 46 U.S.C. 1301, *et seq.*[10]

The Carriage of Goods by Sea Act was the product of conferences held by the various interests primarily affected who agreed to resolve past disputes by supporting a bill embodying the rules of the Convention. The bill accordingly had the support of carriers, shippers, cargo underwriters, bankers and the admiralty bar. S. Rep. 742, 74th Cong., 1st sess., pp. 3-4; H. Rep. 2218, 74th Cong., 2d sess., pp. 1-3; Hearings before the Senate Committee on Commerce on S. 1152, 74th Cong., 1st sess. (herein referred to as Senate Hearings); Hearings before House Committee on Merchant Marine and Fisheries on S. 1152, 74th Cong., 2d sess. (herein referred to as House Hearings). The Act particularized, in greater detail than the Harter Act, numerous rights and liabilities of carriers and shippers and made a number of significant changes in prior law. These changes are summarized in the House Report at pages 6-9, which concludes: "it will be

---

[9] The Convention was ratified with the understanding that in the event of conflict the provisions of the Carriage of Goods by Sea Act would prevail. 51 Stat. 246.

[10] The Carriage of Goods by Sea Act supersedes the Harter Act as to bills of lading in foreign commerce. The Harter Act remains in effect as to bills of lading in domestic commerce, except where the bill of lading declares that it is subject to the Carriage of Goods by Sea Act. (Sec. 13.) The present bills of lading so declared (R. 52).

obvious why the demand of cargo owners is so universal that the bill be enacted into law" (p. 9).[11]

The new act made no change, however, in the basic scheme of the Harter Act as outlined above. It continued, and strengthened, the shipowners' obligations of seaworthiness, proper manning, outfitting and proper care and stowage of cargo, and the prohibition against contracting out of these obligations. (Sec. 3). It also reiterated and strengthened the carriers' immunity from liabilty for faults and errors of navigation established by Section 3 of the Harter Act. Section 4(2)(a) (*infra*, Appendix, p. 52) provides:

> Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—
>
> (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

The language of that section grants the same immunity from liability afforded by Section 3 of the

---

[11] Principal among them, in addition to that discussed in the text immediately below, were: (a) A provision (Section 4(5)) prohibiting the carrier from limiting his liability below $500 per package or customary freight unit. Under prior law there had been no restriction on such limitations. (b) A provision (Section 3(6)) allowing cargo owners one year within which to bring suit. Under prior law, shorter time limitations in bills of lading had been sustained (see p. 38, *infra*). (c) Elimination of various "exception clauses" relieving the carrier of liability (Section 3(1) and (8)) and placing on the carrier the burden of proof that loss or damage was not due to his fault or neglect. (Section 4(2)(q).)

All of the foregoing had long been sought by cargo interests. (*E.g.*, House Hearings, p. 41.)

Harter Act but, by eliminating the condition that due diligence have been exercised to make the ship seaworthy in all respects, whether or not causally related to the damage, the Carriage of Goods by Sea Act made the immunity unconditionally available to the carrier.[12]

Thus both statutes proclaim a policy of distributing the various risks of transportation, as between carrier and cargo, in accordance with a uniform statutory scheme under which the risk of cargo damage caused by errors and faults in navigation is to be borne by cargo rather than by carrier. The "Both-to-Blame" clause conforms to and implements this policy by effecting precisely the same distribution of loss between carrier and cargo where the carrier is only partly at fault, as that decreed by Congress where the carrier is solely at fault. It applies only in circumstances in which the statutes declare that the carrier shall not "become or be held responsible for any damage or loss" and can never be invoked against losses which the statutes require the carrier to bear.

---

[12] The consequence of this change was to remove the effect of this Court's decision in *The Isis* (*May* v. *Hamburg-Amerikanische Etc. Gesellschaft*), 290 U.S. 333, which held that the failure of the carrier to make the ship seaworthy in all respects barred resort to the immunity from liability for negligent navigation even where the unseaworthiness did not contribute in any way to the damage done.

II

Neither Section 3(8) Nor Section 4(3) of the Carriage of Goods by Sea Act Prohibits the "Both-to-Blame" Clause

Respondents' contention that the "Both-to-Blame" clause is directly prohibited by either Section 3(8) or Section 4(3) of the Carriage of Goods by Sea Act was rejected by the District Court (R. 106-108) and not passed on by the Court of Appeals (R. 146 and footnote 9 at R. 145-146). We think the lack of merit of that contention is apparent on the face of the two provisions relied on. And even if the text of those provisions could bear the construction placed upon it by respondents, such a construction would be clearly negated by the fact that Congress rejected a proposed amendment designed to outlaw the clause explicitly.

Section 3(8) provides:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

This provision forbids contracting out of certain specified duties and obligations only, *i.e.*, those

"provided in this section [Section 3]". It is only "negligence", "fault", or "failure" in respect of those specified duties which the statute forbids the carrier to avoid by contract. Section 3 imposes no duties respecting errors or faults of navigation; these are dealt with in Section 4(2)(a) which expressly relieves the carrier from liability for such errors or faults. Since the "Both-to-Blame" clause does not apply unless the only fault of the carrier consists in an "act, neglect or default * * * in the navigation or in the management of the ship" (p. 5, *supra*), the prohibition in Section 3(8) is wholly inapplicable to that clause.[13]

There is no support for respondents' argument that "negligence" is to be read, without regard to the context of the section, as a prohibition of contracts relieving from liability for negligence generally. Section 1 of the Harter Act, which similarly denied validity to contracts relieving from liability arising from "negligence, fault, or failure in" specified duties, has been consistently construed as

---

[13] The second sentence of Section 3(8), relating to benefit of insurance clauses, was aimed, as its text indicates, at a device by which shipowners, once they satisfied their liability to cargo, became subrogated to the cargo's claim against its insurer. Benefit of insurance clauses, although held valid even before the enactment of the Harter Act (*Phoenix Insurance Co.* v. *Erie & Western Transportation Co.*, 117 U.S. 312), had been the subject of a protracted legal battle between shipowners and cargo insurers, since their effect was to shift the entire burden of risk to the insurers who would normally have been subrogated to cargo's cause of action against the shipowner. *Cf. Luckenbach* v. *McCahan Sugar Co.*, 248 U.S. 139; *The Turret Crown*, 297 Fed. 766 (C.A. 2), certiorari denied, 264 U.S. 591.

The benefit of insurance provision of Section 3(8) is plainly restricted, as is all of Section 3(8), to attempts by carriers to limit those liabilities established by the rest of Section 3.

relating only to "negligence in respect to those duties." *The Jason*, 225 U.S. 32, 50-51; see also *Calderon* v. *Atlas Steamship Co.*, 170 U.S. 272, 277-278; *The Irrawaddy*, 171 U.S. 187, 190; *Aktieselskabet Cuzco* v. *The Sucareseco*, 294 U.S. 394, 402; *The Germanic*, 124 Fed. 1, 2-3 (C.A. 2).[14]

Section 4(3) provides:

> The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

This provision also clearly has no relevance to the problem to which the "Both-to-Blame" clause is addressed. It is concerned with the location of responsibility for "loss or damage sustained by the carrier or the ship". The "Both-to-Blame" clause, on the other hand, is concerned with the location of responsibility for loss or damage sustained by the cargo. It enables the carrier to recoup amounts otherwise chargeable to it on account of "loss of, or damage to, or any claim whatsoever of the owners of said goods" (*supra*, p. 5). Although necessarily cast in the form of an indemnity because of the indirect method by which the carrier is otherwise made to respond for cargo damage, its effect is

---

[14] See also *Macnamara & Son* v. *"Hatteras,"* 33 Ll. L. Rep. 233, 234 (Admiralty Division, Irish Free State), referring to "* * * the restrictions, *viz.*, 'in proper loading,' 'stowage,' etc., in Section 1 of the Harter Act—reading, as I do, the words 'in proper loading, stowage,' etc., as modifying 'negligence' and 'fault' as well as 'failure.'" The court reiterated that "in Section 1 the negligence spoken of is limited to negligence 'in proper loading, stowage,' * * *".

limited to relieving the carrier from responsibility for damage to its cargo from those risks (errors in navigation or management) as to which the statutes declare a policy of immunity.[15]

Neither Section 3(8) nor Section 4(3) can conceivably be thought to have been directed against the "Both-to-Blame" clause since both sections were originally drafted long before the clause came into use.[16] During the hearings on the Car-

---

[15] The evident purpose for which Section 4(3) was inserted in the Hague Rules (see pp. 19-20, *supra*, and n. 16, *infra*) was to protect the shipper from any liability to the carrier or the ship for damage caused by goods shipped, which might be imposed under national law, beyond that imposed by Section 4(6) (relating to inflammable explosive or dangerous cargo). British courts had held the shipper liable as under an implied warranty that goods tendered to a common carrier were fit for carriage by such carrier. Lord Campbell, C.J., in *Brass* v. *Maitland*, 6 El. and Bl. 470, 119 Eng. Rep. 940; *Bamfield* v. *Goole & Sheffield Transport Co.*, [1910] 2 K.B. 94, 113; *Great Northern Railway Co.* v. *L. E. P. Transport and Depository Limited*, [1922] 2 K.B. 742, 758.

That the clause was limited to this purpose is indicated by its reference exclusively to the "shipper"—who would be held liable on such a warranty. On the other hand, questions of damage or loss to cargo are the concern of the owner of the cargo; it is the owner who recovers from the noncarrying vessel and it is from the owner that the "Both-to-Blame" clause authorizes recoupment. The draftsmen of the Hague Rules and the Carriage of Goods by Sea Act carefully distinguished between the shipper and the owner of the cargo. Thus Section 3(5) of the Act distinguishes between the rights of "the shipper" and those of "any person [party to the contract of carriage] other than the shipper." And where the owner is meant to be included, the Act, as in Section 4(2)(i), speaks of "the shipper or owner of the goods." Section 1(a), 3(3)(a) and (b), 3(5), 3(7), 4(2)(i), 4(5), 4(6), 5, 6, 7, 9 and 11 all use the word "shipper" where the context shows that only the shipper is meant.

[16] Both sections were taken verbatim from the identically numbered sections of the Brussels Convention of 1924. U.S. Treaty Series No. 931, 51 Stat. 233. The "Both-to-Blame" clause did not come into use until about 1934. See Senate Hearings, *supra*, p. 52.

riage of Goods by Sea Act, cargo underwriters evidently recognized the inadequacy of these provisions to invalidate the clause. At the Senate hearings, Mr. Roger Englar, on behalf of the American Institute of Marine Underwriters, proposed the following amendment to Section 4(3) for the avowed and sole purpose of outlawing the "Both-to-Blame" clause (matter to be added shown in italics):

> The shipper *or owner of the goods* shall not be responsible for loss or damage sustained, *or liability therefor incurred,* by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants. *Any clause or stipulation which seeks to impose liability contrary to the foregoing shall be null and void, including any clause or stipulation requiring the owner of cargo to indemnify the ship or carrier against liability to a colliding vessel for any part of the collision damages paid or payable by such colliding vessel.* [Senate Hearings, p. 54.]

The same amendment was proposed to the House Committee, House Hearings, p. 49.

At both hearings, a representative of the American Steamship Owners' Association strenuously objected to the proposed amendment as changing the existing law (Senate Hearings, pp. 61-63, House Hearings, pp. 53-59). He stated emphatically that the proposed amendment made such a major change in the bill that, if it were

adopted, the Steamship Owners' Association would withdraw its support and oppose the bill. (Senate Hearings, p. 61; House Hearings, p. 54). Other witnesses objected to the proposed amendment as injecting controversy on a measure on which all interests had theretofore been in agreement,[17] and as unduly weighting the bill in favor of the shippers.[18]

The validity and reasonableness of the clause, and the effect on it of the bill as it then stood, were discussed at considerable length before each committee, substantially the same arguments being made as have been made here. Neither committee adopted the proposed amendment, and the bill was submitted to both Houses of Congress with the statement that all interests concerned supported it. H. Rep. No. 2218, 74th Cong., 2d sess., pp. 1-3; S. Rep. No. 742, 74th Cong., 1st sess., pp. 3-4.

In the face of this action it cannot well be argued

---

[17] See testimony of Charles S. Haight, Chairman, Bills of Lading Committee, International Chamber of Commerce, House Hearings, 66-74; Arnold W. Knauth, Secretary of Maritime Law Association of the United States, House Hearings, 87-88; cf. letter of A. B. Barber, Vice-Chairman, Conference on Uniform Ocean Bills of Lading, House Hearings, Part 2, p. 142.

Significantly, no shipper spoke in behalf of the amendment proposed by cargo underwriters; a representative of the American Cotton Shippers Association stated (House Hearings, 97):

> Of course, the note that has been introduced here this morning shows a discordant note. We do not feel, however, even if that should turn out to be so bad as our underwriter representative states, it would have the effect of really increasing the insurance cost.

[18] See testimony of Charles S. Haight, cited, *supra*, n. 17.

that Congress prohibited the clause. The fact is that when squarely faced with the problem, Congress refused to prohibit it. Nor can such refusal be explained on any theory (conjectural at best) that the amendment was deemed unnecessary. While its proponents, out of normal caution, usually described it as a clarifying amendment they also on one occasion candidly admitted that

> the rules in their present form, and that the bill 1152 in its present form, does not invalidate this objectionable clause [Senate Hearings, p. 55].

They further stated that if the proposed amendment were rejected, they reserved "the privilege of coming around to your committee in other connections and urging relief from that clause" (*id.* p. 56).[19] And its opponents objected to it not as unnecessary, but as a major departure from the bill which had been agreed upon by all interested parties. In these circumstances, to hold that Con-

---

[19] Mr. Englar stated (*ibid.*):

> I want to say to you, Mr. Chairman, since you have indicated you are here rather in the capacity of a recorder or observer, if this matter is not taken care of in the bill 1152, I want it understood we reserve the privilege of coming around to your committee in other connections and urging relief from that clause.
>
> It does not have to be done under the Hague rules I can see, but I do not want it understood we accept the Hague rules as final disposition of our rights. We would like to have it taken care of, and if it cannot be taken care of here, we will not go on record as opposing the rules.

gress, having refused to outlaw the Both-to-Blame clause when that question was specifically before it, nevertheless intended to outlaw the clause by the provisions it did enact, would fly in the face of the Court of Appeals' admonition (R. 137) that—

> care must be taken lest what is lost in the legislative halls be granted by courts in the guise of "interpretation".

III

The "Both-to-Blame" Clause Does Not Offend Any Applicable Public Policy; It Is Consistent With and Implements the Policy Expressed in Pertinent Federal Legislation

A. *Since the Harter Act, no public policy requires that the carrier bear the loss or damage resulting to cargo from errors or faults of navigation.*

Since nothing in the Carriage of Goods by Sea Act can be read as directly prohibiting the enforcement of a "Both-to-Blame" clause, and since Congress refused to enact a specific prohibition of the clause, the question before this Court is whether such a prohibition can be implied either from the overall scheme of the Act or from some other source of public policy. Ordinarily, contractual provisions are enforced unless there is some valid reason to deny enforcement. Hence, the burden is on respondents to find some compelling reason for refusing to enforce a provision which is part of the con-

tract of carriage and on the basis of which freight and insurance rates were set.[20]

The court below rested its decision in large part on the view that the "Both-to-Blame" clause offended a public policy against permitting a carrier to relieve itself from liability for negligence. Prior to the Harter Act, a carrier was liable for errors and faults of navigation to the same extent as for lack of diligence in outfitting and rendering seaworthy, etc., and any provision by which it attempted to contract away that liability was denied enforcement as violative of public policy. These decisions were rested on the principle that a carrier cannot, by contract, avoid "the essential duties of [its] employment." *Liverpool Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397, 441.

---

[20] The court below attributed great weight to an asserted inequality of bargaining power between shippers and carriers. We do not believe that such shippers as Standard Food Products Corp., Park & Tilford Import Corp., P. Lorillard Co., Inc., Westinghouse Electric Int'l Co., Canada Dry Ginger Ale, Inc., American Spirits Inc., McKesson & Robbins, Inc., Nash-Kelvinator Co., and R. C. A. Mfg. Co. (R. 44-45), are quite so helpless as the court below would suggest. But, in any event, such an inequality of bargaining power, if it exists, does not deprive the bill of lading of force as a contract, or deny enforceability to bill of lading clauses which are otherwise reasonable. If it did, the courts would, on a parity of reasoning with that of the court below, have denied enforcement to the *Jason* clause, discussed *infra*, pp. 34-38, and to all of the clauses cited at pp. 38-39, *infra*.

The Harter Act, however, made a deliberate change in policy. While reaffirming legislatively the rule that a carrier cannot contract out of any of his essential duties, it declared, contrary to the earlier cases, that the carrier should not be liable to cargo for damage resulting from errors and faults of navigation. It thus redefined the essential duties of the carrier to its cargo, treating errors and faults of navigation, not as a breach of an essential duty, but as an inevitable risk of marine transport which was to be borne by the party on whom the damage fell and was not to give rise to legal liability as between carrier and cargo. In accordance with this basic division of risks, Congress substituted, for the former judicial rules, a legislative specification of the duties from which a carrier could not relieve itself by contract. These duties to cargo included the obligations of seaworthiness, proper outfitting and manning, and proper stowage and care of cargo. They did not include any duty to cargo regarding errors and faults of navigation.

The policy thus embodied in the Harter Act has been a fundamental part of our maritime law for nearly 60 years, and has become the basis of an international agreement to which most maritime nations are parties. That policy was reaffirmed as recently as 1936 in the Carriage of Goods by Sea Act. The later Act likewise specifies the duties from which the carrier may not relieve itself by contract. Section 3(8), discussed *supra,* pp. 23-25.

Those duties do not include a duty to avoid errors and faults of navigation. In both statutes these are the subject of an express immunity.

This Court has frequently referred to the basic change in policy made by the Harter Act. *Compania La Flecha* v. *Brauer*, 168 U.S. 104, 117; *Knott* v. *Botany Mills*, 179 U.S. 69, 71; *The Irrawaddy*, 171 U.S. 187, 193; *The Jason*, 225 U.S. 32, 49; *May* v. *Hamburg-Amerikanische, Etc.*, 290 U.S. 333, 342-343. As this Court said in *May* v. *Hamburg-Amerikanische, Etc., supra:*

> Until the enactment of the Harter Act * * * a shipowner was not at liberty by any contract with the shipper to rid himself of liability to the owners of the cargo for damages resulting from the negligence of the master or the crew [citing cases]. Section 3 of the Harter Act was the grant of a new immunity. Neither the vessel nor her owner was to be liable thereafter for damage or loss resulting from faults or errors in navigation or in the management, if the owner had complied with a prescribed condition.[21]

Similarly, in *The Irrawaddy, supra,* the Court said:

> Although the foundation of the rule that forbade ship owners to contract for exemption from liability for negligence in their agents and employees, was in the decisions of the courts

[21] The Court went on to hold that the condition—rendering the vessel seaworthy in all respects—had not been complied with. By the Carriage of Goods by Sea Act, the condition was removed and the immunity rendered unconditional. See p. 22, *supra.*

that such contracts were against public policy, it was nevertheless competent for Congress to make a change in the standard of duty, and it is plainly the duty of the courts to conform in their decisions to the policy so declared.

B. *The statutes permit enforcement of contractual stipulations not inconsistent with their terms, including stipulations limiting cargo's pre-existing rights.*

The effect which should be given to this legislative change in policy is most clearly demonstrated by *The Jason*, 225 U.S. 32, 49. That case demonstrates that in view of the immunity from liability for negligent navigation conferred by the Harter and Carriage of Goods by Sea Acts, it is now competent for carriers to contract in a manner consistent with this policy even in respects which would not have been permitted before the enactment of those acts.

The Jason involved a question of general average.[22] Under the established principles of general average, a party is denied contribution to general average from parties benefited by a sacrifice "if the danger, to avert which the sacrifice was made, has arisen from the fault of the claimant." *The Ir-*

---

[22] The doctrine of general average is thus described in 1 Benedict, *Admiralty* (6th ed), pp. 296-297:

> When, in peril of shipwreck, a sacrifice is made of a portion of the property thus exposed, to save the residue, every person whose property is saved is liable to contribute, in proportion to his goods saved, to make up the loss of those whose goods have been sacrificed for the common benefit. This is called a general average, or an average contribution.

rawaddy, 171 U.S. 187, 189. Thus, before the Harter Act, the carrier could not have enforced a contract requiring cargo to contribute to its sacrifices made to avert a common peril arising from the carrier's error of navigation, because such contribution would to that extent have relieved the carrier from the consequences of its servants' negligence.

In *The Irrawaddy*, this Court held that the Harter Act did not of its own force change the applicable law of general average. But in *The Jason*, this Court recognized the essential distinction, which we think the court below ignored, between the function of courts when they are asked to declare the rights of parties as created by statute and their function when asked to invalidate a private consensual agreement as contravening the policy of that statute. It held that the Harter Act did make it competent for the parties by contract to provide for general average contribution in such a situation. The Court said, at pp. 55-56:

> In our opinion, so far as the Harter Act has relieved the shipowner from responsibility for the negligence of his master and crew, it is no longer against the policy of the law for him to contract with the cargo-owners for a participation in general average contribution growing out of such negligence; and since the clause contained in the bills of lading of the *Jason's* cargo admits the shipowner to share in the general average only under circumstances where by the act he is relieved from responsibility,

> the provision in question is valid and entitles him to contribution under the circumstances stated.

The principles announced and applied in *The Jason* are precisely applicable here. The effect of the previously existing law, to which the *Jason* clause was addressed, was to require the carrier to bear the entire burden of its sacrifices to save the venture from peril, notwithstanding the fact that those sacrifices also benefited cargo and would, but for the errors and faults of navigation, have been shared by cargo under the principles of general average. The decision in *The Jason* held that "under circumstances where by the act [the carrier] is relieved from responsibility," it could by contract require cargo to bear its share of such sacrifices. The "Both-to-Blame" clause, like the *Jason* clause, is applicable only in situations where the acts relieve the carrier from responsibility. Like the *Jason* clause, it operates to make a statutory immunity effective in a situation where, because the responsibility arose indirectly, the Harter and Carriage of Goods by Sea Acts did not of their own force operate to remove it.

This Court thus rejected the view that "direct authorization" is essential to the validity of a bill of lading clause. Cargo had vigorously argued in *The Jason* that:

> The Harter Act confers no right to contract for such right, and indeed confers no right to contract for any exemption. The act itself

> gives and measures the exemption and no right to contract for any further exemption or privilege exists. [225 U.S. at 45].

Referring to the *Jason* clause, this Court said in *May* v. *Hamburg-Amerikanische Etc.,* 290 U.S. 333, 343:

> To create that obligation [to contribute to general average] there was need of an agreement. For a time there was doubt whether such an agreement, if made, would be consistent with public policy. The doubt was dispelled by the decision in *The Jason, supra.*

To the same effect see *Aktieselskabet Cuzco* v. *The Sucarseco,* 294 U.S. 394, 402.

Respondents persuaded the Court of Appeals that *The Jason* was distinguishable on the ground that the *Jason* clause "is not to be approached as a restriction of the rights of cargo as our present agreement so clearly is" (R. 147).[23] But this was not the ground on which the *Jason* clause was sustained. In *The Jason* the clause was viewed by all parties and the Court as a restriction on cargo's rights. For this reason, cargo there strenuously

---

[23] The Court of Appeals in part supported its position by reference to this Court's language in *Aktieselskabet Cuzco* v. *The Sucarseco,* 294 U.S. 394, 403, which said that the effect of the *Jason* clause was to authorize the master "to act directly for cargo in relation to cargo's duty to contribute in general average." This characterization of the clause, made in answer to an argument by the non-carrying vessel that it should not be liable for the amounts contributed by cargo to general average under a *Jason* clause, was plainly not intended to suggest that as between carrier and cargo the *Jason* clause did not impose a new duty.

resisted it on substantially the same grounds that are urged here (see pp. 36-37, *supra*). It was sustained, not because it left cargo's rights undiminished, but "because it admitted the shipowner to share in general average only in circumstances where by the Harter Act he was relieved from responsibility." *Aktieselskabet Cuzco* v. *The Sucarseco*, 294 U.S. 394, 403.

The suggestion of the court below that all provisions "limiting the shipper's rights" (R. 147) are invalid unless specifically authorized by statute is thus plainly contrary to this Court's decision in *The Jason*. It is contrary also to numerous other decisions of this and other federal courts, sustaining and enforcing bill of lading provisions for which there was no express statutory warrant. Among clauses which have been upheld are those limiting the carrier's liability, even for negligence, to a stipulated amount, *Reid* v. *Fargo*, 241 U.S. 544; providing that freight shall be deemed earned, ship and/or cargo lost or not lost, *Allanwilde Transport Corp.* v. *Vacuum Oil Co.*, 248 U.S. 377; limiting the time within which suit must be brought, *K. Ikuno* v. *Morris & Co.*, 22 F. 140 (C.A. 4), certiorari denied, 276 U.S. 626; *Switzerland General Ins. Co.* v. *Navigazione Libera Triestina*, 91 F. 2d 960 (C.A. 2); requiring notice of claim within a prescribed time as a prerequisite to any suit, *Bank of California* v. *International Mercantile Marine Co.*, 64 F. 2d 97 (C.A. 2), certiorari denied, 290 U.S. 649; *The St. Hubert*, 107 Fed. 727 (C.A. 3),

certiorari denied, 181 U.S. 621; relieving the carrier from liability for unseaworthiness or defects of machinery not discoverable by due diligence, *The Prussia,* 93 Fed. 837 (C.A. 2), certiorari denied, 174 U.S. 803; *The Floridian,* 83 F. 2d 949 (C.A. 2), certiorari denied, 299 U.S. 577; *cf. The Carib Prince,* 170 U.S. 655. All of these clauses plainly limited the shipper's preexisting rights, with no possible benefit to the shipper except as the freight rate might be affected, yet all were sustained.

The argument of the Court of Appeals from public policy thus disregards both the applicable federal legislation and the decisions of this Court implementing that legislation. Congress has twice declared, by Section 3 of the Harter Act and Section 4(2) of the Carriage of Goods by Sea Act, that carriers by sea are not to be chargeable by their cargo with responsibility for acts of negligent navigation. That declaration would seem *ipso facto* to establish the reasonableness of clauses which, as the "Both-to-Blame" clause, do no more than make effective the limitation. *Cf. Chicago B. & Q. R. Co.* v. *McGuire,* 219 U.S. 549. As Judge Medina said in the District Court (R. 113):

> the statutes express a legislative policy that carriers should not and that cargo owners should bear the risk of damage to cargo due to the carrier's negligent navigation by its servants. I do not see how I can invalidate the contractual provision by asserting a directly contrary policy to be controlling.

C. *The "Both-to-Blame" clause is a reasonable means of implementing the congressional policy of relieving the carrier from liability to its cargo for errors and faults of navigation.*

The court below, in addition to its arguments from public policy discussed above, seems to have deemed the "Both-to-Blame" clause unreasonable or otherwise objectionable because, in its view, that clause introduced uncertainties into the applicable law, and upset the general scheme of rights among parties to a collision established by *The Chattahoochee,* 173 U.S. 540, and *The Atlas,* 93 U.S. 302 (*supra,* pp. 11-14). As we have stated above (*supra,* p. 8), we do not believe the issue before the Court is whether, apart from contract, the result brought about by the "Both-to-Blame" clause could or should be reached by judicial decision. But, in any event, we think the court's practical objections to the result produced by the clause are without merit and rest on misconceptions. Not only does the clause not have the defects which the court attributed to it, but it has, we believe, the distinct merit of avoiding an obvious anomaly and of implementing and making effective the policy adopted by Congress.

The "Both-to-Blame" clause introduced no new uncertainties in the enforcement of cargo's rights (Cf. R. 138). The problems of enforcement by cargo are the same whether a "Both-to-Blame"

clause is involved or not. The difficulty of obtaining jurisdiction over all necessary parties exists in any event. Cargo must always face the problem of selecting a forum in which to proceed against the non-carrier. And any uncertainty arising from the necessity for the non-carrier to get jurisdiction over the carrier can only redound to the benefit of cargo since the only result of a failure to obtain jurisdiction over the carrier would be that the "Both-to-Blame" clause never becomes effective.

Similarly, complications which might arise from the assertion by either vessel of its right to limit liability can have no bearing on the reasonableness of the clause. Limitation of liability by either vessel might reduce or nullify the carrier's indirect liability for cargo damage, thereby mitigating or removing cargo's obligations under the clause. In no event could cargo's obligations under the clause be increased by limitation.

Nor does the "Both-to-Blame" clause affect the principles laid down in *The Chattahoochee, supra,* and *The Atlas, supra* (cf. R. 139). In considering respondent's contentions in this respect, it may be helpful to regard the mutual relationships of a carrier, its cargo, and the non-carrying vessel in a "Both-to-Blame" collision as forming three legs of a triangle. *The Chattahoochee* dealt with one leg—the relationship of the carrying vessel to the non-carrying vessel. The non-carrying vessel there was permitted to include the amount it had paid as damages to the cargo of the carrying vessel

in its collision damages, and to recover half of that amount from the carrier, notwithstanding the immunity given the carrier by Section 3 of the Harter Act. In so holding, the Court emphasized that it was concerned only with the relationship of "two colliding vessels to each other" (173 U.S. at 555), and that the Harter Act did not affect that relationship. The "Both-to-Blame" clause also does not affect that relationship.[24]

The second leg of the triangle is dealt with by *The Atlas*. That case was concerned only with the relationship of cargo to the non-carrying vessel; it held that where the non-carrier was at fault cargo could recover 100% of its damage from it. That relationship also is not affected by the statutes or by the "Both-to-Blame" clause. Regardless of the existence of such a clause, cargo recovers 100% of its damage from the non-carrying vessel. To the extent that the ultimate burden of that recovery remains on the non-carrier, cargo retains the benefit of the recovery. The "Both-to-Blame" clause comes into play only to the extent that the non-carrier is able to shift the burden of cargo loss to the carrier.

The third leg of the triangle is dealt with in the present case. It concerns solely the relationship between a carrier and its cargo, a relationship with which this Court was not concerned in either *The*

---

[24] It was stipulated below, in recognition of the *Chattahoochee* rule, that the "Esso Belgium's" damages, for a portion of which the "Nathaniel Bacon" is liable, include the amount paid by it to the "Nathaniel Bacon's" cargo.

Atlas or the *Chattahoochee*. It is to this relationship that the Harter Act and the Carriage of Goods by Sea Act apply, and as between these parties they place the risk of cargo damage caused by errors of navigation on the cargo owner. The bill of lading, as a contract between cargo and carrier, affects these parties only. A bill of lading clause is therefore the appropriate method of ensuring that, as between these parties, the statutory principles for distribution of loss shall not be upset by the operation of rules not directed to this relationship. The "Both-to-Blame" clause does not purport to and could not affect the relationship of either the carrier or its cargo to the non-carrying vessel. So far as the rights and liabilities of the non-carrying vessel are concerned, it is immaterial whether the carrier's bill of lading contains a "Both-to-Blame" clause or not.

As between a carrier and its cargo, there can be no doubt that the indirect result of the rules of *The Chattahoochee* and *The Atlas*, in those cases in which they are both applicable, is anomalous. However sound those rules may be as they affect the relationships which they are intended to govern, their indirect effect on a relationship with which neither is concerned produces a result which should, if possible, be avoided. Without a "Both-to-Blame" clause the carrier bears the ultimate burden of half of his own cargo's loss, although his only fault is that of error in navigation for which Congress has said he shall not be liable to his cargo.

Respondents sought in the court below to becloud the realities of the situation by semantic manipulation, characterizing the damages payable by the carrier to the non-carrier as purely "collision" rather than "cargo" damages. That these may be regarded as collision damages as between the two vessels is irrelevant. This Court has held that as between a carrier and underwriters subrogated to its cargo's rights, the right of cargo to recover its damages from the carrier, whether asserted directly or indirectly via the non-carrier, is within the coverage of insurance protecting the carrier against liability for "loss or damage to cargo." *Great Lakes Transit Corp.* v. *Interstate S. S. Corp.*, 301 U.S. 646, 650. In so holding it rejected arguments comparable to those here advanced by cargo with the statement that "The procedure in admiralty did not affect the substantive rights established by the policies." (p. 655). By similar reasoning, arguments from procedural incidents should not be allowed, here, to obscure substantive results or to obstruct the full operation of the legislative policy. The plain fact is that respondents would require a carrier to bear half of the damages incurred by its cargo where both vessels are at fault, although if it had been solely at fault it would have been completely exonerated by statute from liability for damages to its cargo. A provision designed to eliminate this result implements, and does not conflict with, the statutory policy. It is in this light that the reasonableness of the provision must be judged.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the judgment of the District Court reinstated.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
HOLMES BALDRIDGE,
Assistant Attorney General.
JAMES L. MORRISON,
Special Assistant to the Attorney General
SAMUEL D. SLADE,
ARTHUR W. MURPHY,
Attorneys.

BURLINGHAM, VEEDER, CLARK & HUPPER,
ROSCOE H. HUPPER,
RAY ROOD ALLEN,
BENJAMIN E. HALLER,
Of Counsel.

FEBRUARY 1952.

APPENDIX

The pertinent portions of Sections 1-4 of the Harter Act (Act of February 13, 1893, 27 Stat. 445, 46 U. S. C. 190-193) provide as follows:

SEC. 1. It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same,

shall in any wise be lessened, weakened, or avoided.

SEC. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

SEC. 4. That it shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or

property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.

2. Sections 3 and 4 of the Carriage of Goods by Sea Act of 1936 (Act of April 16, 1936, 49 Stat. 1207, 1208-10, 46 U. S. C. 1301, 1303, 1304) provide as follows:

SEC. 3 (1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided

such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: *Provided,* That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3) (a), (b), and (c), of this section: *Provided,* That nothing in this Act shall be construed as repealing or limiting the application of any part of the Act, as amended, entitled "An Act relating to bills of lading in interstate and foreign commerce", approved August 29, 1916 (U. S. C., title 49, secs. 81-124), commonly known as the "Pomerene Bills of Lading Act."

(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quan-

tity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided,* That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact

shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

(7) After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading: *Provided*, That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

SEC. 4. (1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect. or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided,* That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this Act or of the contract of carriage, and the carrier shall not be

liable for any loss or damage resulting therefrom: *Provided, however,* That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided,* That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the

carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1938 55000 778

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
MAR - 6 1952
CHARLES ELMORE CROPLEY
CLERK

No. 450

In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC MUTUAL INSURANCE COMPANY, FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

Cases:	Page
Alcoa S. S. Co. v. *Elmhurst Contracting Co.*, 61 F. Supp. 6, 11	11
Atlas, The, 93 U. S. 302	1, 7
Carib Prince, The, 170 U. S. 655	4
Chattahoochee, The, 173 U. S. 540	7
Fogarty v. *United States*, 340 U. S. 8, 13	8
Great Lakes Transit Corp. v. *Interstate S. S. Corp.*, 301 U. S. 646	2
Hellenic Lines Ltd. v. *American Tobacco Co.*, 1949 A. M. C. 607 (not officially reported)	11
Irrawaddy, The, 171 U. S. 187	4
Jason, The, 225 U. S. 32	4, 5
Leeds Shipping Co. v. *Duncan*, 37 Com. Cas. 213, 42 Lloyd's List Law Rep. 123	11
Mandu, The, 102 F. 2d 459, 114 F. 2d 361, cert. den. 311 U. S. 715	7
Queen Ins. Co. v. *Globe Ins. Co.*, 263 U. S. 487	8

Statutes:	
Carriage of Goods by Sea Act of 1936 (Act of April 16, 1936, 49 Stat. 1207, 46 U. S. C. 1301, *et seq.*):	2, 3, 8
Section 3	6, 7, 11
Section 3(8)	6, 11, 12
Section 4(2)	4, 5, 11, 12
Section 4(2)(a)	4
Section 4(3)	10, 11, 12
Harter Act (Act of February 13, 1893, 27 Stat. 445, 46 U. S. C. 190-195):	2, 3, 4, 5, 7
Section 3	3, 5, 7
Brussels Convention of 1924 (Hague Rules), U. S. Treaty Series No. 931, 51 Stat. 233, ratified, 51 Stat. 246	3, 11

Miscellaneous:	
6 Benedict, *Admiralty* (6th ed.), pp. 155-160, supp. p. 50	3
Hearings before a Subcommittee of the Senate Committee on Foreign Relations, 75th Cong., 3rd Sess., on an International Convention for the Unification of Certain Rules to Govern the Liability of Vessels when Collisions Occur Between Them, etc., Jan. 10, 11, 12, 13 and 14, 1938	9
H. Rep. No. 2218, 74th Cong., 2d Sess.:	11
International Maritime Committee Bulletin No. 57, London Conference, October 1922 (Antwerp 1923)	11
Knauth, *The American Law of Ocean Bills of Lading* (1947 ed.)	3, 11
Ibid., (1937 ed.)	11
S. Rep. No. 742, 74th Cong., 1st Sess., pp. 3-4	3, 11

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 450

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC MUTUAL INSURANCE COMPANY, FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

I

Respondents admit, as they must, that absent a "Both-to-Blame" clause, the rules of *The Atlas* and *The Chattachoochee* (discussed at pp. 11-14 and 41-44 of our main brief), taken together, result "in a shifting of the 'burden' of a part of the cargo loss to the carrier." (Resp. Br., p. 16; see also p. 3). In other words, there is no dispute, and there can be no dispute, that under the decision below the carrier is ultimately responsible for part (normally one-half) of its cargo's damage. This is so, notwithstanding the fact that the statutory policy of the United States, in force for nearly sixty years, is to exonerate the carrier from all responsibility for cargo damage where, as here, the carrier's sole "fault" is what is imputed to it by

law in respect of errors of navigation, by the Master or his employees on the ship.

Respondents' basic position is that it is unreasonable for an ocean carrier to protect itself by contract against the indirect imposition of a liability which could not be imposed directly. They seek to support this position by a niggardly view of the policy of the Harter and Carriage of Goods by Sea Acts, and by efforts to obscure the true economic facts by characterizing the liability which the carrier is required to bear by the decision below as somehow different in kind from the liability which Congress has said the carrier shall not bear.[1]

A. Respondents read the Harter and Carriage of Goods by Sea Acts as being restricted to merely forbidding a particular cause or form of action. They speak of the Act as concerned only with "liability *to the cargo owner*" (emphasis that of respondents') and emphasize that "There is no pleading in either case on which cargo owners or their insurers could possibly be awarded any recovery from the carrier." (Br., p. 17). Respondents seek to support this restrictive, narrow reading of the Acts by implied criticism of the

---

[1] Most of the arguments of characterization are anticipated and dealt with at p. 44 in our main brief. In particular we emphasize again the decision of this Court in *Great Lakes Transit Corp.* v. *Interlakes S. S. Co.*, 301 U. S. 646 which respondents make no genuine effort to discuss (see Respondents' brief p. 15). That case, although involving different facts from those here presented, clearly establishes the following propositions: (a) a liability for "cargo damages" does not lose its character as such because it is asserted indirectly through another vessel; (b) this Court will not allow procedural incidents and matters of characterization to obscure or defeat substantive rights. Those principles have as much relevance here as they did in the *Great Lakes* case.

legislative policy; thus they refer to the immunity conferred by Congress as a "special privilege" (Resp. Br., pp. 19, 20), which they characterize as "a legal 'anomaly'" (*id.*, p. 19) granted "in derogation of common law liability" (*id.*, p. 27).

This attempt of respondents to invoke the discredited doctrine that statutes in asserted derogation of common law should, so far as possible, be ignored, is, we believe, crucial to their position. The immunity given ocean carriers by Section 3 of the Harter Act is not a freak; it arose out of a deliberate legislative policy of redistributing the risks of ocean transport between cargo and carrier, deriving evidently from a desire to encourage American investment and enlarged activity in shipping. (See Pet. Br., pp. 14-22). The statutory immunity, and the policy underlying it, have been established without question for nearly sixty years, and were reaffirmed by Congress in the Carriage of Goods by Sea Act of 1936; they have won general adoption by all the important maritime countries of the world.[2]

---

[2] The Brussels Convention of 1924, referred to at p. 19 of our main brief, is adhered to by Belgium, Denmark, Egypt, Finland, France, Algeria, Germany, Great Britain and Northern Ireland (including British colonies, territories and mandates), Hungary, Italy, Monaco, Norway, Poland, Portugal, Rumania, Spain, Sweden, and the United States. (See Knauth, *Uniform Bills of Lading* (1947 ed.), p. 74). Chile, Estonia, Japan and Jugoslavia signed but have not ratified the convention. Implementing legislation has been enacted by many of the foregoing countries and also, on an optional basis, by The Netherlands. See Knauth, *Uniform Bills of Lading* (1947 ed.) pp. 67, 74; 6 Benedict, *Admiralty* (6th ed.) pp. 155-160, supp. p. 50.

The statement, at p. 19 of our main brief, that the convention was signed by twenty-four nations is in error. It is adhered to by seventeen; four other signatories have not ratified it.

Respondents' attack is made basically not against the Both-to-Blame clause but rather against Section 3 of the Harter Act and 4 (2)(a) of the Carriage of Goods by Sea Act. Indeed, their insistence that those provisions be read as narrowly as possible contains an implicit concession that the Both-to-Blame clause is thoroughly consistent with the statutory provisions when fairly read.

In connection with the foregoing we must stress again that the issue here is not whether the Acts of their own force require the result for which we contend. It is rather whether the Acts declare a legislative policy which the courts, in passing on the reasonableness of bill of lading provisions, should respect and endeavor to effectuate. Thus respondents expose the fallacy in their argument for "strict construction" by citing *The Carib Prince*, 170 U. S. 655 and *The Irrawaddy*, 171 U. S. 187 (Br., p. 27). Both these cases dealt with the rights of the parties *in the absence of contract*, not with whether a contract could be enforced. In *The Carib Prince* this Court recognized that the shipowners may under the Harter Act contract against warranty of seaworthiness (preserving "due diligence"). *The Jason*, 225 U. S. 32, reached a result contrary to what had been held in *The Irrawaddy* because an appropriate contract had been made consistent with the policy of the Harter Act.

We believe that Congress has firmly expressed such a policy and that the legislative policy should be given ungrudging support and effect. That the legislative policy is concerned with much more than merely cutting off direct recovery by the shipper from the carrier is clear. Congress did not merely foreclose a particular

cause of action; it declared that "neither the carrier nor the ship shall be responsible" for cargo damage. Carriage of Goods by Sea Act, Section 4 (2); *cf.* Harter Act, Section 3. That language is clearly broad enough to cover, as between a carrier and its cargo, any imposition of responsibility on the carrier for cargo damage, whether made directly or by indirect means. And the courts, in considering the effect of the statutory policy on bill of lading provisions, have not limited its effect to suits for damage by cargo against carrier. Thus, in *The Jason*, 225 U. S. 32, this Court did not limit Section 3 of the Harter Act to a defense against suits by cargo for damages, but held that the policy of that section supported contracts, theretofore invalid, enabling the shipowner to recover general average contribution from cargo. It reached this result on the ground that the contract provided for such recovery "only under circumstances where by the act [the shipowner] is relieved from responsibility" (225 U. S. at 55).

The consistent purpose of Congress has been to relieve the shipowner from the economic burden of damage to cargo caused by errors of navigation imputable against the shipowner. Under the decision below, the shipowner is made to bear a substantial part of that burden. The clause here in issue designed to eliminate that incongruous result must, we think, be regarded as implementing, and not frustrating, the legislative policy.

B. Respondents argue, however, that the Harter Act merely confers an immunity, while the "Both-to-Blame" clause creates an indemnity. (Resp. Br., p. 21). They say that by the clause cargo is required to "shoulder the burden of the shipowner's tort liability

to another vessel-owner" (Resp. Br., p. 22). By way of *reductio ad absurdum* they suggest that the arguments advanced to support the clause would lead to sustaining provisions requiring cargo to indemnify the shipowner for his entire liability to the non-carrying vessel, or for his own hull damage. (Resp. Br., p. 23).

This ignores the fact that the clause, by its very terms (Pet. Br., p. 51), is designed merely to enable the carrier to recoup, from cargo, that part of the damages recovered by cargo which has come (although circuitously) out of the carrier's pocket. The only obligation which the clause imposes on cargo is that it refund to its carrier such part of cargo's recovery as has been charged back against its own carrier.

In other words, the practical effect is the same as if the District Court had simply decreed that cargo should recover a part only of its damages from the "*Esso Belgium*" and that no part of that recovery could lawfully be charged against the "*Nathaniel Bacon.*"

This result is fully consistent with the carrier's relief from responsibility provided for in the statutes.[3]

---

[3] That Congress had no intention of distinguishing between clauses directly relieving a carrier of liability, and those achieving that result indirectly by indemnity or otherwise, is made abundantly clear by Section 3 (8) of the Carriage of Goods by Sea Act. A benefit of insurance clause—which Congress there declared "shall be deemed to be a clause relieving the carrier of liability"—afforded a means by which the carrier, having paid a liability, could indemnify itself from cargo insurers, thus ultimately relieving itself of that liability. Congress limited its prohibition of such clauses, to cases in which the liability sought to be avoided arose from breach of the duties specified in Section 3 of the Act (see p. 24 n. 13 of our main Brief).

Respondents contend, however, that the clause is objectionable as depriving "innocent parties of full compensation" (Resp. Br., p. 18). But cargo is no less "innocent" in cases in which the other vessel is free of fault; yet Congress has declared that in such case cargo shall get no compensation whatever for damage arising from errors of navigation by the carrier's servants,[4] allowing cargo to recover from its carrier only where unseaworthiness or other fault directly chargeable against the carrier causes the loss. The intended effect of Section 3 of the Harter Act is to deny recovery to "innocent" cargo in the situations to which it is applicable; the policy of Congress is that cargo may be compensated only to the extent that the economic burden of cargo's loss is not imposed on its own carrier. It is presumably for this reason that respondents have found it necessary to suggest that the rule of *The Chattahoochee*, 173 U. S. 540, should be abolished (Resp. Br., p. 20).

Respondents' argument that it is unreasonable, by contract, to limit cargo to less than a full recovery in a both-to-blame situation must be considered in the light of the fact that under the law of most maritime nations cargo's recovery is thus limited. Our courts have not hesitated to apply such law in appropriate cases notwithstanding "public policy" arguments similar to those made by respondents. See *The Mandu*, 102 F. 2d 459, 114 F. 2d 361, cert. den. 311 U. S. 715.

---

[4] To that extent Congress clearly modified the rule of *The Atlas* (See Resp. Br., p. 20), for *The Atlas* had said that cargo could recover in full from either its own carrier or the non-carrier 93 U. S. 302, 315, 317. The Harter Act removed the first alternative.

The "Both-to-Blame" clause is "an indemnity clause known nowhere else" (Resp. Br., p. 34) because it is only under the law of the United States that (absent such a clause) the *carrier's* responsibility for damage suffered by its cargo is greater in a both-to-blame situation than it is where the carrier is held to be solely at fault. A clause designed to eliminate that anomalous result promotes, and does not defeat, the objective of the Carriage of Goods by Sea Act of furthering international uniformity. This Court has long recognized the "special reasons" for maintaining uniformity with the law of other nations in commercial maritime matters. *Queen Ins. Co.* v. *Globe Ins. Co.*, 263 U. S. 487, 493.

II

Respondents argue that the "Both-to-Blame" clause is an attempt to establish the principles of the Collision Convention of 1910, which was signed on behalf of the United States but never ratified by the Senate. (Resp. Br., pp. 36-38). They seek to suggest that the failure of the Senate to ratify that convention implies a legislative disapproval of the "Both-to-Blame" clause. (Resp. Br., p. 20, n. 11).

Even passing the point that inaction by the Senate in 1938 cannot affect what Congress did in 1893 and 1936 (*cf. Fogarty* v. *United States*, 340 U. S. 8, 13), no inference adverse to our position can conceivably be drawn from the failure of the Senate to ratify the Convention. The Convention would, it is true, have eliminated the problem that gave rise to the "Both-to-Blame" clause; but it would also have changed our law in a number of other respects, many of which were

strenuously objected to by various affected interests, including not only cargo but also shipowners, seamen and pilots. See Hearings before a Subcommittee of the Senate Committee on Foreign Relations, 75th Cong., 3d Sess., on an International Convention for the Unification of Certain Rules to Govern the Liability of Vessels when Collisions Occur Between Them, etc., Jan. 10, 11, 12, 13 and 14, 1938.[5] One of the principal grounds of opposition to ratification was that the Convention would not apply in cases in which both vessels and all claimants were American nationals, and its adoption in advance of national legislation would produce confusion and lack of uniformity in American law. (*E.g.*, testimony of Mr. Ira A. Campbell, Hearings, pp. 186-188, 198-199; remarks of Senator Schwellenbach, *id.* pp. 243, 249, 254-255).[6]

---

[5] The principal changes which would have been made by the Convention were: (a) adoption of the rule, as between colliding vessels, of proportionate liability based on degree of fault (Art. 4), (b) allowing cargo to recover from each vessel only an amount proportionate to that vessel's fault (Art. 4), (c) abolition of legal presumptions of fault on the part of colliding vessels (Art. 6), (d) placing a two-year statute of limitations on all damage claims arising out of a collision (Art. 7). The text of the Convention is set out at Hearings, pp. 8-11.

[6] Mr. Campbell, on behalf of the American Steamship Owners' Association, testified at length against ratification (Hearings, pp. 176-304). In addition to the point mentioned in the text, he expressed objection to, or doubt, about many of the substantive features of the Convention, including the proportionate fault rule (e.g., Hearings, pp. 181-193, 212-215) and the abolition of presumptions of fault (e.g., Hearings, pp. 178-180).

The American Steamship Owners' Association, through Mr. Campbell and Mr. Cletus Keating, had been the principal opponents of the Englar amendment to the Carriage of Goods by Sea Act, designed to outlaw the "Both-to-Blame" clause. (See Pet. Br., pp. 27-28).

It should be noted that respondents are disingenuous in suggesting that cargo's position under the "Both-to-Blame" clause is worse than under the Collision Convention because under the clause cargo is "subjected to a potential and uncertain liability which may hang over his head for many years." (Resp. Br., p. 34). Such part of cargo's recovery as the non-carrier is made to bear (one-half unless the parties stipulate otherwise) is subject to no contingency whatever. Under the Collision Convention such a partial recovery is all that cargo would get.[7] The only uncertainty under the "Both-to-Blame" clause is whether cargo will be able to benefit from the hazards of litigation and keep more than that. Such delays as necessarily attend court determination of any litigated issue, whether under both-to-blame situations or any others, have no relevancy as to validity of the clause.

III

Respondents' argument that the "Both-to-Blame" clause is specifically prohibited by Section 4 (3) of the Carriage of Goods by Sea Act (Resp. Br., pp. 39-43) would prove too much. They assert that Section 4 (3) is "the capstone of the structure of the Act" (Resp. Br., p. 39)—a surprising assertion in view of the complete lack of any mention of the section in the Com-

[7] The Collision Convention applies the rule of damage proportionate to degree of fault, in place of the equal division as under American law, but the difference should work in cargo's favor as often as it works against it.

mittee Reports on the Act[8]; and the complete absence, so far as our research shows, of any judicial decision purporting to apply or enforce it.[9] They also say that its purpose was "to forestall the ingenuity of carriers in drafting and inserting in bills of lading oppressive clauses" (Resp. Br., p. 39). This purpose, we had supposed, was dealt with primarily by Section 3 (8), which is expressly concerned with "any clause, covenant, or agreement in a contract of carriage" and which invalidates any such clause relieving the carrier from liability for loss or damage arising from neglect, fault, or failure in the duties specified in Section 3 of the Act. Respondents argument would render meaningless

---

[8] See Sen. Rep. 742, 74th Cong., 1st Sess.; House Rep. 2218, 74th Cong., 2d Sess. In particular, the House Report, in a two and one-half page summary of the "benefits" of the Act made no reference to the section. (H. Rep. *supra*, pp. 6-9).

The language of Section 4 (3) was taken without change from the Brussels Convention of 1924, which in turn took it from the so-called "Hague Rules" approved in 1921 by the International Maritime Committee, as revised at the 1922 meeting of that Committee. See Knauth, *Ocean Bills of Lading* (1927) pp. 114-116. The brief discussions of Section 4 (3) at the 1922 Conference (International Maritime Committee Bulletin No. 37, London Conference, Oct. 1922 (Antwerp, 1923) pp. 457-458, 475-481) from which respondents have quoted one statement (Resp. Br., p. 40) indicate that the section was designed by its drafters to give shippers exemptions from liability for damage caused by cargo comparable to those which Section 4 (2) gave the carrier from liability for damage caused by the carrier. (See especially pp. 457, 479-480).

[9] This section has been held inapplicable to demurrage clauses. See *Alcoa S. S. Co.* v. *Elmhurst Contracting Co. Inc.*, 61 F. Supp. 6, 11; *Hellenic Lines, Ltd.* v. *American Tobacco Co.*, 1949 A. M. C. 607 (not officially reported); *Leeds Shipping Co.* v. *Duncan*, 37 Com. Cas. 213, 42 Lloyd's List Law Rep. 123, 128.

this careful limitation of the scope of the prohibition contained in Section 3 (8). As we have seen, those duties which Section 3 (8) forbids a carrier to avoid by contract do not include any duty to cargo respecting errors and faults of navigation, which are, indeed, the subject of an express immunity conferred by Section 4 (2) (Main Brief, pp. 22-23, 33).

A contract, like the *Jason* clause or the "Both-to-Blame" clause, which is designed to implement and make effective that immunity, is clearly not prohibited by the Act.[10]

The discussions attending the drafting of Section 4 (3) clearly indicate that said section was not intended to foreclose freedom of contract.

Respondents further suggest that "if the provisions of Section 4 (3) are not broad enough to nullify the Both-to-Blame clause, it is only because human language is inadequate to produce that result" (Resp. Br., p. 40). That language could easily be so drafted is shown by the amendment submitted by Mr. Englar and rejected by both committees (Pet. Br., p. 27). The language of that amendment emphasizes the lack of purpose and the inadequacy of Section 4 (3) as enacted to achieve the result for which respondents contend.

---

[10] Significantly, respondents appear to have abandoned here the contention they urged below that Section 3 (8) invalidated the Both-to-Blame clause.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our main brief, the judgment of the Court of Appeals should be reversed and the judgment of the District Court reinstated.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

HOLMES BALDRIDGE,
Assistant Attorney General.

JAMES L. MORRISSON,
Special Assistant to the Attorney General

SAMUEL D. SLADE,
ARTHUR W. MURPHY,
Attorneys.

BURLINGHAM, VEEDER, CLARK & HUPPER,
ROSCOE H. HUPPER,
RAY ROOD ALLEN,
BENJAMIN E. HALLER,
Of Counsel.

MARCH 1952.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
JAN 3 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 450.

UNITED STATES OF AMERICA,

Petitioner,

—against—

FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., *et al.*,

Respondents.

BRIEF FOR RESPONDENTS FARR SUGAR CORPORATION AND AMERICAN SPIRITS, INC., *ET AL.*, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

OSCAR R. HOUSTON,
LEONARD J. MATTESON,
Counsel for Respondents,
99 John Street,
New York 38, N. Y.

ل

ل

INDEX.

PAGE

Opinions Below 1

Jurisdiction 1

The Question Presented 2

Statement 2

Statutes Involved 2

Reasons for Denying the Writ 3

Conclusion 12

Appendix:

Harter Act (Act of February 13, 1893, 27 Stat. 445, 46 U. S. C., Sections 190-195 13

Carriage of Goods by Sea Act (Act of April 16, 1936, 49 Stat. 1207, 46 U. S. C., Sections 1300 *et seq.*) 15

TABLE OF CASES CITED:

Aktieselskabet Cuzco v. *The Sucarseco*, 294 U. S. 394 ..... 5n, 6, 8

American Mutual Liability Ins. Co. v. *Matthews, et al.* (C. A. 2), 182 F. (2d) 322 ..... 5n, 6

Atlas, The, 93 U. S. 302 (1876) 4, 6n

Chattahoochee, The, 173 U. S. 540 (1899) 3, 4, 5, 5n, 6n

Drumlanrig, The (1910), Prob. 249 ..... 4n

Erie R. R. Co. v. *Erie & Western Trans. Co.*, 204 U. S. 220 ..... 5n, 6

Inman v. *South Carolina Railway*, 129 U. S. 128 ..... 8, 11

PAGE

Kensington, The, 183 U. S. 263 8

Liverpool Steam Co. v. *Phenix Ins. Co.*, 129 U. S. 397 7

Milan, The, Lush. Adm. 388 (1861) 4, 4n

North Star, The, 106 U. S. 17 6

Phoenix Ins. Co. v. *Erie and Western Transportation Co.*, 117 U. S. 312 11

Stoomvaart, etc. v. *P. & O. Navigation Co.* (1882), 7 App. Cas. 795 ..... 4n

Toluma, The (C. A. 2), 72 F. (2d) 690, affirmed *sub nom. Aktieselskabet Cuzco* v. *The Sucarseco*, 294 U. S. 394 8

Turret Crown, The (C. C. A. 2), 297 Fed. 766, cert. den. 264 U. S. 591 11

OTHER AUTHORITIES CITED:

Brussels Collision Convention, 1910 ..... 4n

Bulletin No. 57, International Maritime Committee, London Conference, October 11, 1922, p. 480 .... 10n

Carriage of Goods by Sea Act (Act of April 16, 1936, 49 Stat. 1207, 46 U. S. C., Sections 1300 *et seq.*); 2, 6, 8, 9, 10, 10n; 15

Harter Act (Act of February 13, 1893, 27 Stat. 445, 46 U. S. C., Sections 190-195) 2, 3, 5, 5n, 6, 13

Hearings before House Committee on Merchant Marine and Fisheries on S. 1152, 74th Cong., 2d Sess., pp. 49-53 ..... 10n

Hearings before Senate Committee on Commerce on S. 1152, 74th Cong., 1st Sess., pp. 51-59..... 10n

PAGE

Hearings of the Sub-committee on Foreign Relations of the United States Senate, 75th Congress, 3rd Sess., relating to the Collision Convention of 1910, p. 341 ..... 4n

House Report 2218, 74th Cong., 2nd Session., on S. 1152, pp. 1, 6, 7 9

Judicature Act of 1873 (English) 4n

Marsden on Marine Collisions (9th ed., 1934) 136 ... 4n

Roscoe on Damages in Marine Collisions (3rd ed.) 20, 21 ..... 4n

Senate Report 742, 74th Cong., 1st Sess., on S. 1152, p. 4 9

28 U. S. C. 1254(1) 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 450.

UNITED STATES OF AMERICA,

Petitioner,

—against—

FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., *et al.*,[1]

Respondents.

BRIEF FOR RESPONDENTS FARR SUGAR CORPORATION AND AMERICAN SPIRITS, INC., *ET AL.*, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Opinions Below.

The opinion of the District Court for the Southern District of New York (R. 101) is reported at 90 F. Supp. 836. The opinion of the Court of Appeals for the Second Circuit (R. 135) is reported at 191 F. (2d) 370.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on August 31, 1951. The Petition invokes the jurisdiction of this Court under 28 U. S. C. 1254(1).

---

[1] The incorporation in the caption of the Petition of the names of Atlantic Mutual Insurance Company, *et al.*, as respondents is an error. Neither that company, nor any insurance company, has been proceeded against by the United States of America in this litigation or is a party with respect to the question in dispute.

The Question Presented.

The question presented is, we submit, the reverse of the question as stated in the Petition. The question presented is

> "Can any change in public policy be found in the Harter Act of 1893, or the Carriage of Goods by Sea Act of 1936, which would justify and validate the Both-to-Blame clause, which clause concededly violates the public policy of this country existing prior to those Acts?"

Statement.

The statement in the Petition should be supplemented in two particulars:

(a) It was also stipulated that in the carriage of the cargo in question, the War Shipping Administration was engaged as a common carrier in the commercial carriage of merchandise by sea for hire (R. 77).

(b) The recovery of the cargo losses is by the cargo insurers under subrogated rights (R. 74-5, 119-120). The petition for indemnity is against the individual cargo owners (R. 40, 76, 120).

Statutes Involved.

The pertinent portions of the Harter Act (Act of February 13, 1893, 27 Stat. 445, 46 U. S. C., Sections 190-195) and of the Carriage of Goods by Sea Act (Act of April 16, 1936, 49 Stat. 1207, 46 U. S. C., Sections 1300 *et seq.*) are set forth in the Appendix to this brief, *infra*, pp. 13 *et seq.*

Reasons for Denying the Writ.

The decision of the Court of Appeals invalidating the Both-to-Blame clause does not disturb an established carrier cargo-owner relationship but, on the contrary, leaves that relationship as it has heretofore existed since the enactment of the Harter Act, 1893, and before.

The Both-to-Blame clause, while directed at securing relief for the carrier from the effects of this Court's decision in *The Chattahoochee,* 173 U. S. 540 (1899), through an attempted transfer to the innocent cargo owner of a substantial part of the burden of the negligent carrier's liability towards another shipowner for collision damages, was not incorporated in ocean bills of lading prior to 1935, nor used generally until 1937 (R. 137, fn. 1, Petition, 5, fn. 1a).

The validity of the Both-to-Blame clause has never been admitted by the cargo interests. It has been continuously resisted and the clause has never been enforced by any court.

The decision below is therefore of importance only to carriers who seek to disturb violently their relationship with cargo owners through validation of this clause which would deprive innocent cargo owners of a substantial part of the benefit of their immemorial right to recover their damages *in solido* against a negligent non-carrier, and force them to turn over a share of such recoveries to the negligent carrier.

The right of the innocent cargo owner to recover its damages in full from a negligent third party, irre-

spective of the possible contributory negligence of any other person, was established beyond reach of any further attack in the decision of this Court in *The Atlas,* 93 U. S. 302 (1876). In that case this Court rejected the English rule of *The Milan,* Lush. Adm. 388 (1861), limiting cargo recoveries against one of two joint tort feasors to a moiety (one-half) and held that no extension of the admiralty rule of division of damages between mutual wrongdoers can be sanctioned so as to do an injustice to the innocent owner of cargo (p. 318).[2]

In *The Chattahoochee,* this right of the cargo owners was again upheld and this Court further held

---

[2] The English moiety rule of *The Milan* became fixed in English law as a result of the Judicature Act of 1873, which made the rules enforced in the Admiralty courts, as of the date of the enactment, the law of England in all courts in maritime cases. That rule, although fixed by the statute, has nevertheless been severely criticized by English Courts and text writers as being not logically satisfactory, historically unsound, and working positive injustice. *Marsden on Marine Collisions* (9th ed., 1934) 136; *Roscoe on Damages in Marine Collisions* (3d ed.) 20, 21; *The Drumlanrig* (1910), Prob. 249, at 262 and 269; *Stoomvaart, etc.* v. *P. & O. Navigation Co.* (1882), 7 App. Cas. 795, 819.

Nevertheless, the English proportionate fault rule, *i. e.,* liability proportionate to degree of fault, was incorporated (as to property interests only) in the Brussels Collision Convention, 1910, which has been adopted by a considerable number of countries. That Convention has never been ratified by this country, and numerous attempts at ratification have been successfully opposed by cargo interests and others. The case against that Convention from this country's point of view is stated in the Report of John M. Woolsey (shipowners' counsel, and later United States District Judge) to the Assistant Secretary of Commerce (1928), filed in opposition to ratification of the Convention. See Hearings of the Sub-committee on Foreign Relations of the United States Senate, 75th Congress, 3rd Sess., relating to the Collision Convention of 1910, p. 341 (see R. 139, fn. 3).

The Both-to-Blame clause is a conceded attempt by carriers to obtain from cargo owners by forced contract the equivalent of the benefits of the rejected Collision Convention. See Petition, 6, fn. 2 and 9, fn. 6, subd. 4.

that the Harter Act did not affect the right of the non-carrier to include, as part of its claim for collision damages, the amount of its liability to cargo on the other vessel for the purpose of division of damages between negligent shipowners under the admiralty rule. This Court in that case specifically rejected the argument (p. 552) that to hold the carrier liable in this indirect manner for a part of the damages suffered by cargo would be to disregard and nullify the Harter Act.[3]

The petitioner's argument in support of the Both-to-Blame clause is that the imposition of this "indirect liability for cargo damage" is contrary to the purpose of the Harter Act, but, since it has been established from the time of the decision in *The Chattahoochee* that the Harter Act has nothing to do with that liability, that argument is not supportable.[4]

It is correctly stated in the Petition (8, also 9, fn. 6, subd. 3) that the recovery by the non-carrier is for "collision damages" in which it is allowed

---

[3] The correctness of the decision in *The Chattahoochee*, is not here in question, for it is under that rule, applicable here by stipulation (R. 75-76, 120), that the shipowner's liability for which indemnity is sought under the Both-to-Blame clause arises. (See R. 144.) The principle of the decision in *The Chattahoochee* was, however, approved and followed by this Court in *Aktieselskabet Cuzco* v. *The Sucarseco,* 294 U. S. 394, 400-401. It was held equally applicable to cases arising prior to the Harter Act, *Erie R. R. Co.* v. *Erie & Western Trans. Co.,* 204 U. S. 220, where it was held that defenses under bill of lading provisions open to the carrier against a claim by the cargo owner would not avail the carrier in respect to the claim of another vessel owner for collision damages consisting of that vessel owner's payments to the cargo owners.

[4] The effect of the doctrine of *The Chattahoochee* is that the sum of the changes in the shipowner's duties in the Harter Act was not enough to justify extending his release beyond the direct claims of shippers. *American Mutual Liability Ins. Co.* v. *Matthews* (C. A. 2), 182 F. (2d) 322, 326, per Learned Hand, *C. J.*, and see R. 145.

to include the amount of its required payments to cargo or to other innocent persons. The non-carrier recovers its payments to cargo, not as cargo damage, but as a part of its own damages flowing directly from the other vessel's tort, *i. e.*, from the breach of the carrying vessel owner's duty of safe navigation owed to the non-carrying vessel (R. 143). *Erie R. R. Co.* v. *Erie & Western Trans. Co.*, 204 U. S. 220, 226; *Aktieselskabet Cuzco* v. *The Sucarseco*, 294 U. S. 394, 400-401; *American Mutual Liability Insurance Co.* v. *Matthews, et al.* (C. A. 2), 182 F. (2d) 322, 324.

Since the liability for which indemnity is sought is not a liability for damage to cargo resulting from the shipowner's negligence towards the cargo owner, but a liability to another vessel owner, resulting from negligence toward that vessel owner, for collision damages of which that vessel owner's liability to the cargo owner is only an incidental part, it is clear, we submit, that neither the Harter Act, nor the Carriage of Goods by Sea Act, can justify an attempt by the carrier to impose on the innocent cargo owner an obligation to indemnify the carrier against that liability.[5]

---

[5] Once this distinction is clearly grasped, the suggestion that the result of the decision in *The Chattahoochee* is anomalous disappears. The liability arising between negligent vessel owners as the result of a collision is a single indivisible liability on the part of that one having the lesser claim to pay the other one-half the difference between the respective losses sustained, *The North Star*, 106 U. S. 17, 20. The carrier's liability is no different when cargo is involved. Cargo recovers its damage from an independent tort feasor who is liable *in solido*. The carrier is liable because that independent tort feasor has sought a division of damages and proved him also negligent. With this the cargo owner has nothing to do. A division of damages between the non-carrier tort feasor and another negligent party will not be permitted to affect adversely an innocent owner of cargo, *The Atlas, supra*, 93 U. S. 302, 318. The validation of the Both-to-Blame clause would lead to equally "anomalous" results and greatly complicate collision litigation (R. 138 and fn. 2 on that page).

The Acts may impose on the cargo owner the risk of the carrier's negligence toward him (Petition, 11). They do not impose on the innocent cargo owner the carrier's risk of liability to another shipowner for his negligence toward that shipowner and for collision damages suffered by that other shipowner as a result of a collision. Yet it is against this latter liability that the Both-to-Blame clause seeks indemnity from the cargo owner.

The clause is in no sense a "consensual agreement" (Petition, 10, 15). It is a clause which ocean carriers by combined action have sought to force on cargo owners as a condition of the carriage of their goods. The Petition refers to the clause as a standard part of ocean bills of lading today (Petition, 7) and sets forth the fact that it has been adopted by the North Atlantic Freight Conference (5, fn. 1a). In the court below it was stated by shipowner's counsel that the clause is contained in practically all bills of lading issued by steamship companies doing business to and from the United States today (R. 139).

As the Court of Appeals pointed out, the lack of equality of bargaining power between shippers and carriers has long been recognized in our law, and unreasonable stipulations have not been allowed to stand (R. 139). The shipper has no choice but to accept the bill of lading tendered by the carrier or to abandon his business. *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 441.

The Both-to-Blame clause is unreasonable on its face. It would deprive the cargo owner of a substantial part of his long-established rights against third parties as no statute has done, and force him to turn over those benefits to the negligent shipowner. No

conceivable benefit to the cargo owner can result. On the contrary, the shipowner, having been relieved of liability for negligence to the owner of his cargo, desires now to be indemnified *pro tanto* for his liability for negligence to another shipowner. Thus would the incentive to due care on the part of the shipowner be whittled away.

Any consent to such a clause is presumed to be lacking. *Inman* v. *South Carolina Railway,* 129 U. S. 128, 139; *The Kensington,* 183 U. S. 263, 268.

The Jason clause, referred to in the Petition (p. 14), on the contrary, gives reciprocal rights. Under it the shipowner and the cargo owner both contribute in general average, *i. e.*, to those expenses and sacrifices incurred by the voluntary act of the master, after a disaster, as the agent of both, to save all interests from a greater loss. They contribute only *pro rata* according to benefits actually received. The Jason clause merely invests the master with authority to act directly for the cargo in a situation of common peril. *Aktieselskabet Cuzco* v. *The Sucarseco,* 294 U. S. 394, 402-403. It is not a diminution of the rights cargo would otherwise have. *The Toluma* (C. A. 2), 72 F. (2d) 690, 693, affirmed *sub nomine, Aktieselskabet Cuzco* v. *The Sucarseco,* 294 U. S. 394, *supra.*

The Jason clause, unlike the Both-to-Blame clause, does not call for an indemnity, but only for contribution to expenses incurred for joint account. Any resemblance between these clauses is superficial only, as pointed out by the Court of Appeals (R. 147).

The Both-to-Blame clause violates both the purpose and the specific provisions of the Carriage of Goods by Sea Act of 1936.

The purpose of the Act was to define by law the rights and liabilities of ocean carriers and shippers in foreign commerce, to relieve shippers, bankers and others from the necessity of examining closely long and complicated bills of lading (see R. 139 and R. 52-67) to ascertain their rights and responsibilities, and to simplify and establish uniformity of ocean bills of lading. House Report 2218, 74th Cong., 2nd Sess., on S. 1152, pp. 1, 6, 7; Senate Report 742, 74th Cong., 1st Sess., on S. 1152, p. 4.

The Both-to-Blame clause would destroy international uniformity. It would have effect principally in suits in the United States (Petition, 6, fn. 2). If validated, it would place on cargo owners in our courts a burden of liability and indemnity found practically nowhere else in the world. It would place on them a liability quite outside the provisions of the Act and not authorized thereby. It would require any holder in due course of a bill of lading in international commerce to inspect and consider, not the provisions of the Act as intended by Congress, but the peculiar provisions of the bill of lading, to determine his rights and responsibilities, and to protect himself against this unusual liability as best he may.

The Carriage of Goods by Sea Act, §6, permits special agreements as to the rights and immunities of the carrier only when no bill of lading has been issued and when the agreement is incorporated in a non-negotiable receipt, so marked, and provided such agreement does not apply to ordinary commercial shipments made in the ordinary course of trade.

Section 4(3) of that Act provides specifically that the shipper shall not be liable for loss or damage sustained by the carrier arising from *any* cause without the shipper's neglect.[6] In the Petition (p. 13) it is sought to avoid the effect of this clause by describing the cargo owner's liability to indemnify the carrier as a recoupment by the carrier. But the carrier's liability to the non-carrier is to him loss or damage sustained for which the cargo owner, if the clause were upheld, would be liable to the carrier as indemnitor. Such liability is forbidden as clearly as human language can express a prohibition.[7]

Section 3(8) not only forbids any lessening of the shipowner's liability for cargo damage resulting from his negligence otherwise than as provided in the Act, but also expressly forbids any benefit of insurance *or similar clause*. The Both-to-Blame clause is an at-

---

[6] The framers of this clause intended by the language chosen "to give the shipper the largest protection that could be devised for him". See Bulletin No. 57, International Maritime Committee, London Conference, October 11, 1922, p. 480, on the drafting of the Brussels Convention, 1922, adopted as the Carriage of Goods by Sea Act, 1936, with minor changes not here relevant.

[7] At the hearings before the Senate and House Committees on the Carriage of Goods by Sea Act, all cargo representatives made it clear that in their opinion the Both-to-Blame clause, which had only recently appeared, would be invalidated by Section 4(3). One cargo representative tentatively suggested that to avoid prolonged litigation a provision be included specifically condemning the clause. The other cargo representatives were so clear that §4(3) invalidated the clause that they preferred not to support the suggestion of a specific prohibition, rather than to jeopardize or delay the passage of the Bill which was considered otherwise desirable. Accordingly, the suggestion was not pressed or adopted. This is the "rejection" referred to in the Petition (p. 13). See Hearings before Senate Committee on Commerce on S. 1152, 74th Cong., 1st Sess., pp. 51-59; Hearings before House Committee on Merchant Marine and Fisheries on S. 1152, 74th Cong., 2d Sess., pp. 49-53.

tempt by carriers to secure the benefit of the cargo owner's insurance by indirection, on the unwarranted assumption that all cargo is insured.[8] The cargo owner is himself required to stand as insurer of the carrier and can protect himself against the liability sought to be imposed only by insurance. The Both-to Blame clause is therefore a forbidden compulsory insurance clause, *Phoenix Ins. Co.* v. *Erie and Western Transportation Co.*, 117 U. S. 312, 323; *Inman* v. *So. Car. Rwy.*, 129 U. S. 128, 139. The carrier cannot obtain by indirection that for which he may not stipulate directly. *The Turret Crown* (C. C. A. 2), 297 Fed. 766, 778, cert. den. 264 U. S. 591. The Both-to-Blame clause is a benefit of insurance or similar clause and, therefore, forbidden.

The Both-to-Blame clause patently overturns settled principles of our law (R. 138). This shifting of the burden of insurance and other costs should not be left to the control and choice of the one group which is seeking to avoid the burden (R. 140, fn. 4). And certainly not when the curtailment of the cargo owner's rights sought by the clause has no direct authorization of law and has been successfully opposed by cargo interests in the halls of legislation (R. 140), *e. g.*, their successful opposition to the Brussels Collision Convention, 1910. (See fn. 2, *supra*, p. 4.) The argument that there is some desirability in the clause because it would introduce into our law conformity to the law of those countries which have adopted that Convention (Petition, 6, fn. 2) loses all

[8] The United States in this case (R. 81), and carrier shipowners generally (R. 140, fn. 4), are protected by so-called P. and I. insurance against the liability for which they seek indemnity from the innocent cargo owners by means of the Both-to-Blame clause.

force when the successful opposition to the adoption of that Convention in this country is considered? The greater the stress on this argument, the more surely it follows that any correction in the situation, anomalous or otherwise, of which the shipowner complains, if any is warranted, is for Congress rather than for the courts (R. 139).

To read into the statutes support for the Both-to-Blame clause is, indeed, to push the policy of the legislation to a point where it has definitely not gone, and is in itself legislation (R. 145).

While it might be advantageous to the cargo interests if this Court were to grant the writ and to affirm the decision of the Court of Appeals, rather than merely to deny the writ, we submit that the decision of the Court of Appeals for the Second Circuit, a court so widely experienced in the field of admiralty law and maritime relations, is so clearly correct that there is small need for this Court to review the decision below.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

OSCAR R. HOUSTON,
LEONARD J. MATTESON,
Counsel for Respondents.

APPENDIX.

Harter Act, 1893.

THE HARTER ACT

27 U. S. Statutes at Large, 445. 46 U. S. Code, Sec. 190-195
[Feb. 13, 1893.]

Sec. 1. It shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect. 46 U. S. Code, Sec. 190.

Sec. 2. It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided. 46 U. S. Code, Sec. 191.

Sec. 3. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner, or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent or master, be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the

thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service. 46 U. S. Code, Sec. 192.

Sec. 4. It shall be the duty of the owner or owners, master, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described. 46 U. S. Code, Sec. 193.

Sec. 5. For a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States. 46 U. S. Code, Sec. 194.

Sec. 6. This act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statute defining the liability of vessels, their owners, or representatives.

Sec. 7. Sections one and four of this act shall not apply to the transportation of live animals. 46 U. S. Code, Sec. 195.

Carriage of Goods by Sea Act, 1936.

AN ACT

Relating to the carriage of goods by sea.
49 Stat. c. 229, 1207.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this Act. 46 U. S. Code, §1300.

Title I

Section 1. When used in this Act—

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) The term "goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) The term "ship" means any vessel used for the carriage of goods by sea.

(e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship. 46 U. S. Code, §1301.

Risks

Sec. 2. Subject to the provisions of section 6, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth. 46 U. S. Code, §1302.

Responsibilities and Liabilities

Sec. 3. (1) The carrier shall be bound, before and at the beginning of the voyage to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: PROVIDED, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3) (a), (b), and (c), of this section: PROVIDED, That nothing in this Act shall be construed as repealing or limiting the application of any part of the Act, as amended, entitled "An Act relating to bills of lading in interstate and foreign commerce", approved August 29, 1916 (U. S. C., Title 49, secs. 81-124), commonly known as the "Pomerene Bills of Lading Act."

(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: PROVIDED, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

(7) After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading: PROVIDED, That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability. 46 U. S. Code, §1303.

Rights and Immunities

Sec. 4. (1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representatives;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: PROVIDED, That nothing herein contained shall

be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Savings or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this Act or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: PROVIDED, HOWEVER, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per

customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: PROVIDED, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master, or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any. 46 U. S. Code, §1304.

Surrender of Rights and Immunities and Increase of Responsibilities and Liabilities

Sec. 5. A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this Act, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this Act shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this Act. Nothing in this Act shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average. 46 U. S. Code, §1305.

Special Conditions

Sec. 6. Notwithstanding the provisions of the preceding sections, a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligations as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea: PROVIDED, That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect: PROVIDED, That this section shall not apply to ordinary commercial shipments made in the ordinary course of trade but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement. 46 U. S. Code, §1306.

Sec. 7. Nothing contained in this Act shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea. 46 U. S. Code, §1307.

Sec. 8. The provisions of this Act shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916, or under the provisions of sections 4281 to 4289, inclusive, of the Revised Statutes of the United States, or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels. 46 U. S. Code, §1308.

TITLE II

Section 9. Nothing contained in this Act shall be construed as permitting a common carrier by water to discriminate between competing shippers similarly placed in time and circumstances, either (a) with respect to their right to demand and receive bills of lading subject to the provisions of this Act; or (b) when issuing such bills of lading, either in the surrender of any of the carrier's rights and immunities or in the increase of any of the carrier's responsibilities and liabilities pursuant to section 5, title I, of this Act; or (c) in any other way prohibited by the Shipping Act, 1916, as amended. 46 U. S. Code, §1309.

Sec. 10. Section 25 of the Interstate Commerce Act is hereby amended by adding the following proviso at the end of paragraph 4 thereof: "PROVIDED, HOWEVER, That insofar as any bill of lading authorized hereunder relates to the carriage of goods by sea, such bill of lading shall be subject to the provisions of the Carriage of Goods by Sea Act." Repealed by Transportation Act, 1940, 54 Stat. 929.

Sec. 11. Where under the customs of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in this Act, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to

have been guaranteed by the shipper. 46 U. S. Code, §1310.

Sec. 12. Nothing in this Act shall be construed as superseding any part of the Act entitled "An Act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property", approved February 13, 1893, or of any other law which would be applicable in the absence of this Act, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded, on or after the time they are discharged from the ship. 46 U. S. Code, §1311.

Sec. 13. This Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this Act the term "United States" includes its districts, territories and possessions: PROVIDED, HOWEVER, That the Philippine Legislature may by law exclude its application to transportation to or from ports of the Philippine Islands. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this Act shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: PROVIDED, HOWEVER, That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this Act, shall be subjected hereto as fully as if subject hereto by the express provisions of this Act: PROVIDED, FURTHER, that every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this Act. 46 U. S. Code, §1312.

Sec. 14. Upon the certification of the Secretary of Commerce that the foreign commerce of the United States in its competition with that of foreign nations is preju-

diced by the provisions, or any of them, of title I of this Act, or by the laws of any foreign country or countries relating to the carriage of goods by sea, the President of the United States may, from time to time, by proclamation, suspend any or all provisions of title I of this Act for such periods of time or indefinitely as may be designated in the proclamation. The President may at any time rescind such suspension of title I hereof, and any provisions thereof which may have been suspended shall thereby be reinstated and again apply to contracts thereafter made for the carriage of goods by sea. Any proclamation of suspension or rescission of any such suspension shall take effect on a date named therein, which date shall be not less than ten days from the issue of the proclamation.

Any contract for the carriage of goods by sea, subject to the provisions of this Act, effective during any period when title I hereof, or any part thereof, is suspended, shall be subject to all provisions of law now or hereafter applicable to that part of title I which may have thus been suspended. 46 U. S. Code, §1313.

Sec. 15. This Act shall take effect ninety days after the date of its approval; but nothing in this Act shall apply during a period not to exceed one year following its approval to any contract for the carriage of goods by sea, made before the date on which this Act is approved, nor to any bill of lading or similar document of title issued, whether before or after such date of approval in pursuance of any such contract as aforesaid. 46 U. S. Code, §1314.

Sec. 16. This Act may be cited as the "Carriage of Goods by Sea Act." 46 U. S. Code, §1315.

Approved, April 16, 1936.

Brief for Belgian Overport, S.A., M.V. *Esso*

Respondent Seas Trans-Owner of the *Belgium*.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
FEB 23 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 450.

UNITED STATES OF AMERICA,

Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*, FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., *et al.*,

Respondents.

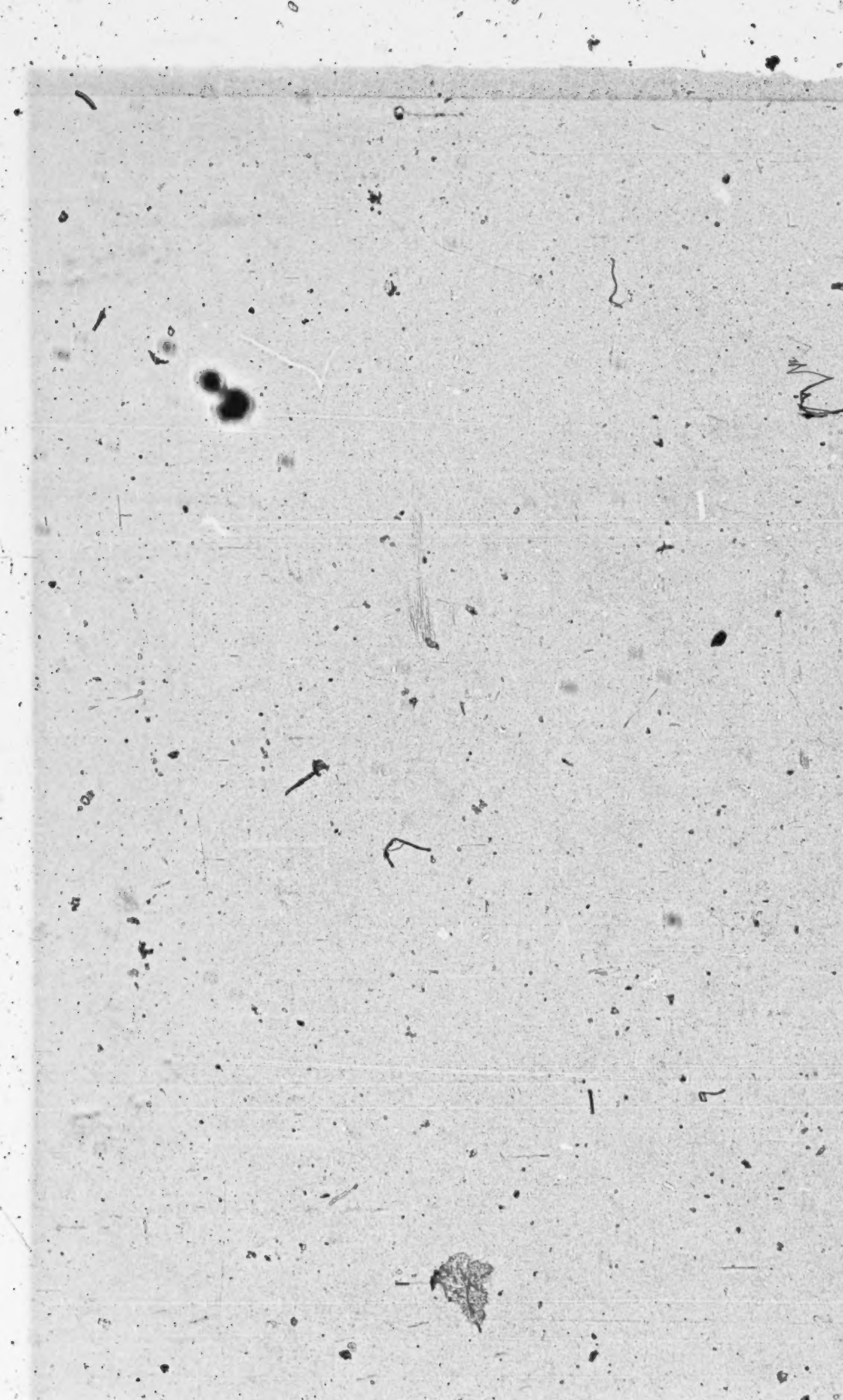
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT BELGIAN OVERSEAS TRANSPORT, S. A., OWNER OF THE MV. *ESSO BELGIUM*

CLETUS KEATING,
Counsel for Respondent Belgian Overseas Transport, S. A., owner of the MV. Esso Belgium.

EDWIN S. MURPHY,
LOUIS J. GUSMANO,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.



INDEX.

	PAGE
STATEMENT	1
THE FUNDAMENTAL ERROR BELOW	4
POINT I.—Genesis of the Both-to-Blame Clause	5
POINT II.—The clause contravenes no general public policy because there is no attempt to relieve the carrier from any of the present essential duties which it owes to cargo owners	13
POINT III.—The Acts express no policy which conflicts with the Both-to-Blame Clause	20
POINT IV.—Section 3(8) of the Act invalidates only those clauses which lessen the carrier's defined liability "otherwise than as provided in this chapter". The Both-to Blame Clause by explicit terms operates only where a collision occurs as a result of negligent navigation. The Act expressly relieves the carrier from all liability under such circumstances. Since the clause applies only where the carrier is not liable, it does not fall within the prohibition of the section	30
POINT V.—The Both-to-Blame Clause in no way conflicts with that portion of §3(8) of the Act which prohibits usage of "benefit of insurance" or similar clauses	32
POINT VI.—Section 4(3), 46 U. S. C. A. §1304(3), which provides that a shipper is not responsible for loss or damage sustained by a carrier or the ship except where caused by the act, neglect or fault of the shipper, cannot be construed to prohibit a Both-to-Blame Clause	34
CONCLUSION	39

Table of Cases.

	PAGE
Aktieselskabet Cuzco v. *The Sucaresco*, 294 U. S. 394 (1935)	29
Balfour, Guthrie & Co. v. *American-West African Line*, 136 F. 2d 320 at p. 323 (2d Cir., 1943)	23
Clark v. *Barnwell*, 12 How. 272, 280 (1851)	6, 17
Compania La Flecha v. *Brauer*, 168 U. S. 104, 117 (1897)	7
Fleming v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52, 58 (8th Cir., 1940)	29
Great Lakes Corp. v. *S. S. Co.*, 301 U. S. 646 (1937)	36
Keystone Mining Co. v. *Gray*, 120 F. 2d 1, 10 (3d Cir., 1941)	29
Knott v. *Botany Mills*, 179 U. S. 69, 71 (1900)	7
Liverpool Steam Co. v. *Phenix Ins. Co.*, 129 U. S. 397 (1888)	5, 6, 15, 16, 17
Luckenbach v. *McCahan Sugar Co.*, 248 U. S. 139 (1918)	33
New Jersey Steam Nav. Co. v. *Merchants' Bank*, 6 How. 344 (1847)	6
New York & Cuba Mail S. S. Co. v. *Amer. S. S. O. Mut. P. & I. Ass'n*, 72 F. 2d 694 (2d Cir., 1934)	37
New York & Cuba Mail S. S. Co. v. *Ansonia Clock Co.*, 139 Fed. 894 (S. D. N. Y., 1905)	18
Pennsylvania R. R. Co. v. *International Coal Co.*, 230 U. S. 184, 198 (1912)	29
Phoenix Insurance Co. v. *Erie and Western Trans. Co.*, 117 U. S. 312 (1886)	33
Propeller Niagara v. *Cordes*, 21 How. 7, 23 (1858)	6, 17
Railroad Company v. *Lockwood*, 17 Wall. 357 (1873)	6, 15, 16

PAGE

Scarburgh v. *Compania Sud-Americana De Vapores*, 174 F. 2d 423 (2d Cir., 1949) 23, 31
Seller v. *The Pacific*, Fed. Cas. 12, 644 (1861) 6
The Atlas, 93 U. S. 302 (1876) 5, 25, 38
The Campfire, 156 F. 2d 603 (2d Cir., 1946) 22, 30
The Ghattahoochee, 173 U. S. 540 (1899) 11, 12, 13, 14, 15, 23, 24, 25, 26, 27, 28, 29, 34, 35
The Cockatoo, 61 F. 2d 889 (2d Cir., 1932) 36
The Delaware, 14 Wall. 579, 597 (1871) 5
The Delaware, 161 U. S. 459 (1895) 8
The Irrawaddy, 171 U. S. 187 (1897) 8, 9, 10, 11, 15, 18, 33
The Jason, 225 U. S. 32 (1911) 9, 10, 11, 12, 15, 18, 19, 21
The Kensington, 183 U. S. 263 at p. 270 (1902) 15
The Lady Pike, 88 U. S. 1, 14 (1874) 5
The Maggie Hammond, 9 Wall. 435, 458 (1869) 5
The Maria, 15 F. Supp. 745, 750 (S. D. N. Y., 1936) 19
The Pennsylvania, 19 Wall. 125 (1873) 26
The Vermont, 47 F. Supp. 877, 879 (E. D. N. Y. 1942) 23
The Victor (1860) 2 Law Times 331 38
The W. W. Bruce, 14 F. Supp. 894 5
United States v. *United Shoe Machinery Co.*, 264 Fed. 138 at p. 174 (E. D. Mo., 1920), affirmed 258 U. S. 451 29

STATUTES.

Carriage of Goods by Sea Act

Section 3-1a 7
Section 3(8) 7, 17, 30, 31, 32
Section 4-2a 3, 7, 12, 31
Section 4(3) 27, 29, 34, 35, 36, 37, 38, 39

Harter Act

46 U. S. C. A. §190 ..... 5, 7, 19
46 U. S. C. A. §192 ..... 7, 12, 19

MISCELLANEOUS.

	PAGE
46 Code of Fed. Reg. Cum. Supp. 1136	2
Senate Report No. 742, 74th Cong. 1st Sess., dated May 13, 1935	22
House of Representatives Report No. 2218, 74th Cong. 2nd Sess., dated April 23, 1936	22
Hearings before the Subcommittee of the Committee on Foreign Relations, 75th Cong., 3rd Sess. (1938)	26
Hearings before the Commerce Committee (74th Congress, 1st Session, May 10, 1935, S. 1152)	27, 28
Minutes of Evidence Taken Before the British Joint Select Committee on the Carriage of Goods by Sea Act, July 3, 1923, at p. 128, Col. 1	22
Hearing before Committee on Merchant Marine and Fisheries on S. 1152, 74th Cong., 2d Sess. (1936)	28, 29
Deutsch's *Model Ocean Bill of Lading* (1940), 224 *et seq.*	5
Knauth's *The American Law of Ocean Bills of Lading* (3d ed. 1947), 175 *et seq*	5, 9, 21, 23, 25, 28
23 Virginia Law Review (1937) 595-596	29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 450.

UNITED STATES OF AMERICA,

Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*, FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT BELGIAN OVERSEAS TRANSPORT, S. A., OWNER OF THE MV. *ESSO BELGIUM*

STATEMENT.

The decree of the District Court adjudged, pursuant to the stipulation of the parties, that the collision in this case occurred because of the mutual fault of both vessels. Belgian Overseas Transport, S. A., owned and operated the MV. *Esso Belgium*, the non-carrying vessel, which collided with the SS. *Nathaniel Bacon*, the carrier of the cargo involved. No issue is presented concerning the

non-carrying vessel's direct liability to the cargo owners for this loss and the decree of the District Court so provided. The reversal by the Court of Appeals did not affect that portion of the decree (R. 148), with the result that whether or not the Both-to-Blame Clause is upheld, the respondent Belgian Overseas Transport, S. A., owner of the MV. *Esso Belgium*, remains liable to the cargo owners. None the less, its interest as well as the interests of all United States shipowners, including the U. S. Government,[1] will be seriously affected by the Court's decision in this case. Accordingly, this brief is filed by Belgian Overseas Transport, S. A., a party to this suit, in opposition to the cargo owners' contention that the Both-to-Blame Clause is invalid.

Of the maritime nations, it is only in the United States that cargo involved in a mutual fault collision may recover in full from the non-carrying ship. See p. 23, *infra*.

In this country, while a cargo owner cannot sue its carrier for cargo losses which result from negligent navigation (because both the Harter Act and the Carriage of Goods by Sea Act explicitly absolve a carrier from such liability to cargo), the cargo owner may, none the less, recover its full loss from the non-carrying vessel, and the latter may include the amount in the division of damages between it and the carrying vessel.

By this indirection, the property of the carrying vessel—which the Act exonerates—is made to pay for half of the cargo loss. See p. 36, *infra*.

---

[1] The Both-to-Blame Clause is contained in practically all bills of lading issued by steamship companies doing business to and from the United States. The Clause is an essential part of all bills of lading issued by the United States of America. In July 1942, the War Shipping Administration approved a bill of lading containing this Clause and ordered its use by all agents of the United States of America (General Order 16, July 6, 1942 as amended, 46 Code of Fed. Reg. Cum. Supple. 1136, 7 Fed. Reg. 5246).

What has resulted is that the carrier is made to pay more if the navigators of the vessels were partly at fault than if either were solely at fault. The Both-to-Blame Clause is designed to avoid this undesirable anomaly of our maritime law and to implement the public policy announced in the Harter Act and in the Carriage of Goods by Sea Act. The Clause provides (R. 58):

> "If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier.
>
> The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact."

The Clause applies only where a collision occurs as a result of "any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship." That language is verbatim with the wording of §4-2a of the Carriage of Goods by Sea Act, which exonerates the carrier from liability for loss or damage occurring under those circumstances. It is in those instances alone, where the Act

itself exonerates the carrier, that the Clause operates. It applies only where the cargo owner has obtained payment for his loss, and one-half or some other portion of that payment has come from the carrier which was not liable to the cargo owner by the express terms of the Act. Under the Clause the cargo owner promises to return to the carrier whatever amount the cargo owner has received from the non-carrying ship but which the non-carrying ship has collected from the carrier.

The Fundamental Error Below.

The decision of the Court of Appeals may be summarized as follows:

Any bill of lading clause "cutting down shippers' rights" (R. 146) is void.

The Both-to-Blame Clause cuts down the shippers' rights.

Therefore the Both-to-Blame Clause is void.

That syllogism contains a fundamental error. The major premise is unsound.

With great facility, starting from an unsound major premise, the majority in the Court of Appeals reached a wrongful conclusion. Contrary to the view below, the decisions of this Court establish that a bill of lading clause is not invalid even though it cuts down the shippers' rights, provided it does not exonerate the carrier from its responsibility for negligence where such responsibility exists, or in other words, provided it does not lessen the essential duties owing to the cargo owner by the carrier.

If the major premise below had been correct, sound reasoning, as found in the decision of the District Court (R. 101), would have led to the conclusion that a Both-to-Blame Clause is valid because it in no respect diminishes

the essential duties of the carrying vessel and, indeed, it implements the statutory policy exonerating the vessel from liability to its cargo arising from negligent navigation.[2]

POINT I.

Genesis of the Both-to-Blame Clause.

Prior to the Harter Act, 46 U. S. C. A. §190 *et seq.* (1893), a carrier was directly responsible to a cargo owner for damages to cargo resulting from a collision whether the carrier was negligent or otherwise. *The Atlas*, 93 U. S. 302 (1876).

The basis of its liability in such a case was that its relation to the cargo owner was, in effect, one of an insurer (act of God and public enemy excepted), with the result that whether or not it violated any duty of its employment, it was directly liable for cargo loss. *The Delaware*, 14 Wall. 579, 597 (1871); *The Maggie Hammond*, 9 Wall. 435, 458 (1869); *The Lady Pike*, 88 U. S. 1, 14 (1874); *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397 (1888).

If a collision occurred because of the mutual fault of both vessels, the carrier was directly liable to the cargo, apart from its insurer's status, for the reason that the negligent navigation of a vessel by the carrier's servants was then a breach of one of the essential duties owing by

---

[2] The only other reported opinion dealing with a Both-to-Blame Clause is the District Court's opinion in *The W. W. Bruce*, 14 F. Supp. 894, which upheld the validity of the Clause. On appeal, however, the Court of Appeals for the Second Circuit found that the Clause did not apply because the carrying vessel was unseaworthy, and its opinion stated that the ground for its decision made it unnecessary to determine whether the Clause was valid. 89 F. 2d 834 (2d Cir., 1938).

The text writers agree that the Both-to-Blame Clause is valid and enforceable under the Carriage of Goods by Sea Act. See Knauth's *The American Law of Ocean Bills of Lading* (3d ed. 1947), 175 *et seq.*, and Deutsch's *Model Ocean Bill of Lading* (1940), 224 *et seq.*

the carrier. *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 440 (1888); *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 344 (1847); *Seller* v. *The Pacific*, Fed. Cas. 12, 644 (1861).

Stipulations by a carrier which attempted to relieve it from any of the essential duties of its employment were considered against public policy and void.

This rule brought about two situations:

(1) The carrier could effectively, by stipulation with the cargo owner, exempt itself from its legal liability which resulted where a collision occurred as a result of the sole fault of the non-carrying vessel, because such a stipulation, although it cut down the shipper's rights, did not relieve it from any of the essential duties of its employment. See *Clark* v. *Barnwell*, 12 How. 272, 280 (1851); *Propeller Niagara* v. *Cordes*, 21 How. 7, 23 (1858).

(2) The carrier could not, by stipulation, exempt itself from its legal liability which resulted where a collision occurred because of negligent navigation, whether alone or in conjunction with the negligent navigation of the other vessel, because in that event it would be relieving itself from one of the essential duties which its status as a carrier then imposed upon it. *Railroad Company* v. *Lockwood*, 17 Wall. 357 (1873); *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397 (1888).

Thus, the test in determining the validity of agreements between a cargo owner and a carrier has always been: Does the stipulation relieve the carrier from one of the essential duties of its employment? If the essential duties of the carrier are not lessened, the clause is valid and enforceable irrespective of whether the shipper's rights—which are not co-extensive with the carrier's essential duties—are diminished. That is the very rule which the Carriage of Goods

by Sea Act has adopted in determining the validity of clauses between carrier and cargo owner, namely, unless the clause lessens the carrier's liability to cargo as prescribed in the Act, it is valid. Section 3(8) of the Carriage of Goods by Sea Act, discussed pp. 30-32, *infra*.

In 1893, Congress enacted the Harter Act, 46 U. S. C. A. §190 *et seq.* Section 3 of that Act (46 U. S. C. A. §192), relieves the carrier from responsibility for damage or loss resulting from negligent navigation upon the condition that it exercises due diligence to make the vessel *in all respects* seaworthy and to properly man, equip and supply the vessel.

In 1936, Congress enacted the Carriage of Goods by Sea Act, 46 U. S. C. A. §1300 *et seq.* Section 3-1a, together with §4-2a of that Act, similarly relieves the carrier from responsibility for damage or loss resulting from negligent navigation. In addition, it removes the condition contained in the Harter Act that, before the exemption could be availed of, the carrier must exercise due diligence to make the vessel seaworthy *in all respects*. The Carriage of Goods by Sea Act, by thus removing the condition of making a vessel seaworthy *in all respects*, broadened the exemption from liability for negligent navigation contained in the Harter Act.

The decisions which declare that all contracts exonerating carriers for loss or damage arising from negligence of their servants are void, expressly state that this was the law and public policy *before the Harter Act*. See *Compania La Flecha* v. *Brauer*, 168 U. S. 104, 117 (1897); *Knott* v. *Botany Mills*, 179 U. S. 69, 71 (1900). Under existing law, while contracts relieving the carrier from its essential duties prescribed by the Acts (including liability arising from its negligence other than negligent navigation or management) continue to be void, clauses dealing with negligent navi-

gation or management may no longer be construed against public policy inasmuch as the carrier by the express terms of both Acts is no longer charged with that responsibility.

Whether the language of the Harter Act (the language of the Carriage of Goods by Sea Act is similar) relieving the carrier from all responsibilities arising from negligent navigation, was sufficient to relieve the carrier from liability for physical collision damage inflicted to another vessel was considered in *The Delaware*, 161 U. S. 459 (1895). This Court there held that the Harter Act was intended to apply solely to the relationship which existed between the carrier and cargo owners. The Harter Act, it was said, did not apply to the liability of one vessel to another.

The question then arose whether the carrier, in view of the immunity from liability for damage to cargo caused by negligent navigation granted by the Harter Act (which is similarly granted by the Carriage of Goods by Sea Act), could recover general average contributions from cargo in cases where the peril arose through the ship's negligent navigation. This Court passed upon that question in *The Irrawaddy*, 171 U. S. 187 (1897). There it was held that, notwithstanding the immunity granted by the Harter Act to a shipowner from liability for damage to cargo occasioned by the ship's negligent navigation, the shipowner nevertheless could not recover any general average contributions in such a situation from the cargo owner.

Following the decision in *The Irrawaddy*, in order to secure indemnity for general average sacrifices from cargo where there had been negligent navigation by the carrier's servants, there was inserted in bills of lading what has come to be known as the "Jason Clause".[3]

---

[3] The Jason Clause read as follows:

"If the owner of the ship shall have exercised due diligence to make said ship in all respects seaworthy and

The effect of the Jason Clause is to secure to the shipowner by express contract a right recognized as proper by the public policy of the United States in both the Harter Act and the Carriage of Goods by Sea Act, but not expressly granted by those Acts.

The validity of the Jason Clause came before this Court in *The Jason*, 225 U. S. 32 (1911). The same arguments were made by cargo underwriters in the *Jason* case as are made here, namely, that a contract carrying out the full immunities recognized as a matter of public policy by the Harter Act (and which are now recognized to an even greater extent by the Carriage of Goods by Sea Act), but not expressly granted by that Act, was against public policy. At p. 54 it was said:

> "The point of the decision in *The Irrawaddy* (and as an authority the case goes no further) is, that while the Harter Act relieved the shipowner from liability for his servant's negligence, *it did not of its own force entitle him to share in a general average rendered necessary by such negligence.*" (Italics ours).

---

properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew, in the navigation or management of the ship, or from latent or other defects, or unseaworthiness of the ship, whether existing at time of shipment or at beginning of the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in General Average, or for any special charges incurred, but with the shipowner shall contribute in General Average, and shall pay such special charges, as if such danger, damage or disaster had not resulted from such fault, negligence, latent or other defect or unseaworthiness."

After the passage of the Carriage of Goods by Sea Act which broadened the immunity from negligent navigation contained in the Harter Act, the shipowners adopted a new form of Jason clause which may be found at p. 96, *Knauth, The American Law of Ocean Bills of Lading* (3d ed. 1947).

The Court then declared that the Jason Clause, in the light of the new policy expressed in the Harter Act, is a valid agreement, saying at p. 55:

> "In our opinion, so far as the Harter Act has relieved the shipowner from responsibility for the negligence of his master and crew, it is no longer against the policy of the law for him to contract with the cargo-owners for a participation in general average contribution growing out of such negligence; and since the clause contained in the bills of lading of the *Jason's* cargo admits the shipowner to share in the general average only under circumstances where by the act he is relieved from responsibility, the provision in question is valid, and entitles him to contribution under the circumstances stated."

The Jason Clause is an agreement with the cargo owner whereby the cargo owner agrees to indemnify the shipowner for damages suffered and vessel sacrifices made to relieve a common peril resulting from negligent navigation. Such a contract is obviously one requiring the cargo owner to indemnify the shipowner against losses caused by the negligence of the shipowner's servants. That clause without question diminishes the shipper's rights because, in the absence of the clause, the shipper is under no obligation to indemnify the owner in general average. The distinction made by the Court of Appeals that under the Jason Clause the cargo owners' rights are not diminished because under that clause the cargo owners merely "waive" the defense available to them under *The Irrawaddy* rule, (R. 147), is without substance. It would seem fundamental that a bill of lading clause requiring a cargo owner to waive a defense otherwise available to him, results in the diminution of the rights of the cargo owner. But the Jason Clause has none the less been held valid because it operates "only

under circumstances where by the act he [the carrier] is relieved from responsibility . . ." (225 U. S. at p. 55).

The *Jason* case shows that under the circumstances involved there and here, a contract by a cargo owner to indemnify a shipowner against loss caused by negligent navigation of his servants is valid, because the only duty of the shipowner under both the Harter Act and the Carriage of Goods by Sea Act is to use due diligence to properly man and furnish a seaworthy vessel. He is no longer chargeable with negligent navigation of the ship by his servants. The *Jason* case upheld the validity of the Jason Clause, not on the ground of "reasonableness", nor on the ground that the shipper's rights were not diminished, but because, in so far as the Harter Act had relieved the shipowner from responsibility for negligence of his master and crew, it was no longer against the policy of the law for him to contract with cargo owners for indemnity.

After the non-carrying vessel was subjected to 100% liability to the cargo owners, the question then arose whether, on a division of the entire damages between two colliding vessels mutually at fault, the non-carrying vessel could recoup one-half of the amount which it had paid to the cargo owners.

That the non-carrying vessel could recoup from the carrying vessel one-half the cargo damage paid by it was decided in *The Chattahoochee*, 173 U. S. 540 (1899). There it was held that the Harter Act was not intended to alter the relations of the two colliding vessels to each other.

Like *The Irrawaddy*, 171 U. S. 187 (1897), *supra*, the *Chattahoochee* case involved merely the construction of the Harter Act as such.

In *The Chattahoochee* the relation between cargo owner and carrier was not considered inasmuch as the only parties before the Court were the non-carrying vessel and the car-

rier. There was thus not involved in the *Chattahoochee* decision a contractual provision between cargo owner and carrier such as there is in the case at bar. The only question before the Court in that case was whether §3 of the Harter Act, 46 U. S. C. A. §192, (the language of §4-2a of the Carriage of Goods by Sea Act is similar) *in and of itself* relieves the carrying vessel from liability to the non-carrying vessel.

The *Chattahoochee* decision recognized that if a collision is due to mutual fault in the navigation of the carrying vessel and another vessel, the Harter Act (as does the Carriage of Goods by Sea Act) furnishes a complete immunity against claims by the cargo owner against the carrier for loss or damage to cargo. Nevertheless it held that the cargo owner may sue the other vessel involved in the collision and recover its full damages from that vessel, and the other vessel may then recover, or recoup, from the carrying vessel one-half of the damages paid to the cargo on such vessel.

Thus, by indirection, in spite of the policy of total immunity announced in both the Harter Act and the Carriage of Goods by Sea Act, cargo recovers one-half of its damages from its own vessel.[4]

The reason for this anomalous situation is that, while the Harter Act and the Carriage of Goods by Sea Act announce a public policy, they are not fully self-executing. In order, therefore, to get the full benefit of the policy of the law announced therein, it is necessary for a shipowner to make appropriate contracts to secure his rights. *The Jason*, 225 U. S. 32 (1911), *supra*.

In the absence of an appropriate contract, such as the Both-to-Blame Clause, the position is that if the shipowner is solely at fault for a collision, he is not liable in any respect for damage to cargo, but, if he has the misfortune

[4] In this respect, the indirect result of the rule of *The Chattahoochee* has been severely criticized. See pp. 23-24, *infra*.

to be only partly at fault for a collision, he must respond by indirection for 50% of the damage to cargo.

The purpose of the Both-to-Blame Clause is to correct by contract this situation and to relieve a shipowner who would not be liable at all to his cargo if he were solely at fault for a collision, from the same liability, through indirection, in a case where he is only partly to blame for a collision.

POINT II.

THE CLAUSE CONTRAVENES NO GENERAL PUBLIC POLICY BECAUSE THERE IS NO ATTEMPT TO RELIEVE THE CARRIER FROM ANY OF THE PRESENT ESSENTIAL DUTIES WHICH IT OWES TO CARGO OWNERS.

It would seem evident that the majority in the Court of Appeals misinterpreted the import of *The Chattahoochee* decision. It was only because the carrying vessel could not invoke its statutory immunities in a controversy between itself and another vessel,[5] that the rule of the *Chattahoochee* resulted. That decision without question did not announce any rule of policy intended to control the relationship of cargo owner and carrying vessel for the fundamental reason that the very basis of the decision was the absence of that relationship. Under the decision of the Court of Appeals in this case, however, the indirect result of the rule of *The Chattahoochee* for all practical purposes has been incorporated into the Harter Act and the Carriage of Goods by Sea Act, with the result that the majority in the Court of Appeals erroneously concluded that a contractual clause modifying the effects of the *Chattahoochee* decision violates the policy of those Acts.

---

[5] In that case this Court expressly declared (173 U. S. at 555): "* * * the relations of the two colliding vessels to each other remain unaffected by this Act, notwithstanding one or both of such vessels be laden with a cargo."

The Court of Appeals obviously lost sight of the fact that the Carriage of Goods by Sea Act continues to govern the relationship of cargo and the carrier, even though a collision occurs with another ship. The fact that the Act does not affect in any way the rights or responsibilities of the non-carrying ship does not put an end to or change the rights and responsibilities of the cargo and the carrier *inter se*. Therefore, in considering the validity of a contract which relieves the carrier from paying indirectly for cargo damage resulting from negligent navigation, it is only necessary to look to the Carriage of Goods by Sea Act to determine whether there is anything in that Act which forbids the contract or whether, on the contrary, the contract does not clearly implement the public policy laid down by the Act but not authorized specifically in so many words.

Moreover, the Court of Appeals was in error in its holding that the indirect result of the rule of *The Chattahoochee* must itself be accepted as the public policy of this country. Based on that false premise, the Court of Appeals ruled that the Clause was void because it necessarily violated this supposed public policy announced by the *Chattahoochee* decision. But the majority in the Court of Appeals ignored the distinction between case law declaring legal principles affecting the relationship between parties in the absence of a contract, and case law which defines the limitations within which the parties may contract to modify the effects of those legal principles.

All case law may be said to express a "policy" only in the limited sense that, in the absence of a contract, the rules announced will control. But that "policy" necessarily is not the "public policy" which may vitiate contracts entered into by the parties. If the latter were true, then it would be impossible under any circumstance for parties to modify, by contract, any result produced by a legal principle. Of

course, *The Jason*, 225 U. S. 32 (1911), *supra* demolishes any contention that the carrier and cargo owners may not by contract overcome case law as such, because in *The Jason* this Court permitted the parties to overcome the effects of the principle laid down in *The Irrawaddy*, 171 U. S. 187 (1897). Indeed, there is no decision which has ever prevented a carrier from contracting as he pleases with a cargo owner, *provided the essential duties owed to the cargo owner by the carrier are not reduced by the contract.* The latter proviso is the sole extent to which the cargo owner and carrier are restricted, and beyond which public policy will be deemed violated.

Obviously, case law which defines consequences imposed by law is to be distinguished from case law which defines the limits within which parties may agree to vary the effects produced by those legal principles. The first, which includes the indirect result of the rule of *The Chattahoochee*, merely expresses what the Courts will hold applicable in the absence of a contract; the second, which includes *Railroad Company* v. *Lockwood*, 17 Wall. 357 (1873), *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397 (1888), and *The Jason*, 225 U. S. 32 (1911), declares under what circumstances a contractual variation of those legal principles may exceed public policy, viz., that it may be deemed to offend public policy only if the carrier attempts to relieve itself of an essential duty of its employment. It is the latter group of cases which control in determining whether the Both-to-Blame Clause offends public policy. "The existence of the rule of public policy, not the ultimate causes upon which it may depend, is the criterion." *The Kensington*, 183 U. S. 263 at p. 270 (1902).

The validity of a bill of lading clause does not depend upon whether the clause reduces the *rights* of the shipper but upon whether the clause reduces the *essential duties* of

the carrier. A bill of lading clause under which a shipper assumes an undertaking, necessarily reduces the rights or increases the burdens of the shipper because, without the clause, the shipper would have been under no obligation to perform the undertaking assumed. The decision of the Court of Appeals in this case, however, would make all undertakings of the shipper under bill of lading clauses automatically invalid. Obviously, however, this is not the law and, indeed, the Court of Appeals recognized that the Carriage of Goods by Sea Act "does not outlaw all contracts between shipper and carrier" (R. 147). The majority in the Court of Appeals repudiated the Clause, not because it conflicted with any specific provision of the Carriage of Goods by Sea Act, but on the erroneous ground that, because the Clause as such diminished the rights of the cargo owner, it violated the supposed "old prohibition against contracts cutting down shippers' rights" (R. 146). But it has long been established that bill of lading clauses which cut down shippers' rights are not invalid, provided they do not diminish the essential duties which the carrying vessel owes to the shipper. The essential duties owing by the carrier to the shipper manifestly are not co-extensive with the rights of the shipper. The principle on which the doctrine that certain stipulations by a carrier violate public policy has not been that the stipulation reduces the rights of the shipper, but the principle is, and always has been, that the stipulation reduces the essential duties owing to the shipper by the carrier.

That this is the rationale of the rule has been often stated by this Court. *Railroad Company* v. *Lockwood*, 17 Wall. 357, 378 (1873); *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 440-441 (1888).

In the *Liverpool* case, it was said at p. 441:

> "But the law does not allow a public carrier to abandon altogether his obligations to the public, and

to stipulate for exemptions which are unreasonable and improper, amounting to an abnegation of the *essential duties* of his employment." (Italics ours).

The *Liverpool* case makes clear that because the carrier, prior to the Harter Act, was responsible for negligent navigation, any stipulation which relieved it from that responsibility was one amounting to "an abnegation of the essential duties of his employment" and was, therefore, against public policy.

That is the very rule which the Carriage of Goods by Sea Act has adopted in determining the validity of clauses between carrier and cargo owner, namely, unless the clause lessens the carrier's liability to cargo as prescribed by the Act, it is valid. Section 3(8) of the Carriage of Goods by Sea Act, discussed pp. 30-32, *infra*.

Indeed, under the decisions prior to the Harter Act whereunder the cargo owner had the legal right to recover his full loss from the carrying vessel when a collision occurred as a result of the sole fault of the non-carrying vessel, the courts uniformly recognized a bill of lading clause which cut down this shipper's right by exempting the carrier from legal liability under such circumstances. Despite the fact that the clause diminished the shipper's legal rights against the carrier, such a clause was sustained because it did not relieve the carrier from any of the essential duties of its employment. See *Clark* v. *Barnwell*, 12 How. 272, 280 (1851); *Propeller Niagara* v. *Cordes*, 21 How. 7, 23 (1858).

In so far as Congress has declared that the carrier is no longer chargeable with the negligent acts of navigation of its servants, any contract by the carrier affecting cargo damage with respect to negligent navigation cannot be held to violate public policy. That Congress clearly intended a change in the standard of duties to which the courts must

conform in their decisions, was unequivocally stated in *The Irrawaddy*, 171 U. S. 187 (1897), at p. 193:

> "Although the foundation of the rule that forbade ship owners to contract for exemption from liability for negligence in their agents and employés, was in the decisions of the courts that such contracts were against public policy, *it was nevertheless competent for Congress to make a change in the standard of duty, and it is plainly the duty of the courts to conform in their decisions to the policy so declared.* * * * The act in question does, undoubtedly, modify the public policy as previously declared by the courts, * * *." (Italics ours).

In *New York & Cuba Mail S. S. Co.* v. *Ansonia Clock Co.*, 139 Fed. 894 (S. D. N. Y., 1905), the District Court decided that the Jason Clause was invalid, relying on the same arguments which are made here by the cargo owners.

This Court, in *The Jason*, 225 U. S. 32 (1911), however, expressly overruled that decision. At p. 52, the Court said:

> "The latter view was adopted by the District Court in *New York & Cuba Mail S.S. Co.* v. *Ansonia Clock Co.*, 139 Fed. Rep. 894, where a clause identical with the one now under consideration was held invalid. This decision was apparently followed, although not cited, by the same court (162 Fed. Rep. 56), and by the Circuit Court of Appeals (178 Fed. Rep. 414, 416), in the case now under review. In reaching this result the courts below have, as we think, misconceived the effect of the language used by Mr. Justice Shiras, speaking for this court, in *The Irrawaddy*, and have given to that decision an import quite beyond its legitimate scope. In that case there was no agreement between shipowner and cargo-owner respecting general average, *nor respecting the consequences of a stranding or other peril that*

might result from the negligence of the master or crew of the vessel." (Italics ours).

We have shown that the Jason Clause is an agreement with the cargo owner whereby the cargo owner agrees to indemnify the shipowner for damages suffered and vessel sacrifices made to relieve the common peril resulting from negligent navigation. Such a contract is obviously one requiring the cargo owner to indemnify the shipowner against losses caused by the negligence of the shipowner's servants. The *Jason* case, 225 U. S. 32 (1911), *supra*, shows that under the circumstances involved there and here, a contract to indemnify a shipowner against losses caused by negligent navigation of his servants is valid, because the only duty of the shipowner under both the Harter Act and the Carriage of Goods by Sea Act is to use due diligence to properly man and furnish a seaworthy vessel. He is no longer chargeable with negligent navigation of the ship by his servants. This is aptly stated in *The Maria*, 15 F. Supp. 745 (S. D. N. Y., 1936) at p. 750:

> "Prior to the passage of the Harter Act, February 13, 1893, 46 U. S. C. A. §190, *et seq.*, the vessel owner could not secure contributions from cargo owners toward his own expenses and sacrifices in connection with a casualty resulting from the negligence of the vessel owner's employees, but he may now, under that act, by contractual provisions, secure contributions *to the extent that section 3 permits a vessel owner to escape liability for damages to cargo resulting from such.*" (Italics ours).

We submit that the Both-to-Blame Clause, which holds the carrier to the fullest measure of duty imposed upon it by law, which implements the policy of the Harter Act and the Carriage of Goods by Sea Act by relieving the carrier

from indirect liability in circumstances where the Acts relieve it from direct liability, which corrects an anomalous situation that has been the subject of severe criticism, and which brings the law of this country into closer accord with the law of the rest of the civilized world, cannot be deemed to violate public policy or be held unreasonable.

POINT III.

The Acts express no policy which conflicts with the Both-to-Blame Clause.

Both the Harter Act and the Carriage of Goods by Sea Act declare a broad public policy with respect to the relations of a vessel and its cargo. That public policy, expressed in the clearest language, is that the shipowner is not to be responsible to its cargo for loss or damage caused by negligent navigation. That risk under the express terms of the Acts is to be borne by cargo.

Both the Harter Act and the Carriage of Goods by Sea Act provide that certain clauses, of which the Both-to-Blame Clause is not one, are illegal. Congress, when asked specifically to declare the Both-to-Blame Clause illegal, declined to do so. See p. 27, *infra*.

To suggest that it requires an Act of Congress specifically authorizing the Both-to-Blame Clause to make it legal, requires a finding that, even if a clause is clearly within the policy declared by Congress, the parties cannot contract unless the particular contract has been specifically authorized in so many words.

Congress laid down the broad policy of complete exemption to the shipowner for cargo damage caused by negligent navigation. The Both-to-Blame Clause is clearly within the frontiers of that policy.

Thus the question comes down flatly to whether the Both-to-Blame Clause is within the broad policy laid down by Congress and hence is legal under the principles of *The Jason*, 225 U. S. 32, *supra*.

The statement of the majority in the Court of Appeals (R. 146-147) "* * * that Congress meant to grant the carriers only whatever benefits were explicitly set out in the legislation" is justified only in so far as it relates to benefits which the carrier obtains as a matter of law and not by agreement. In this respect, the Court of Appeals recognized that the Act does not outlaw all contracts between shipper and carrier (R. 147). Obviously, Congress did not intend that the Act influence the whole field formerly open to the right of contract[6]. True, the parties may not make a contract nullifying any duty imposed by the Act upon the carrier[7]. Other than this, however, they may contract, and with respect to many subjects, they do so. Bills of lading contain such contract provisions as the carrier's "liberties" clauses, the Jason Clause, and clauses dealing with freight, demurrage, lien, transshipment and other subjects.

Indeed, the Hague Rules, from which our Carriage of Goods by Sea Act stems, are entitled "International Convention for the Unification of *Certain Rules* relating to Bills of Lading" (Italics ours).

That the Act was not intended to be a closed code of law was clearly indicated by Congress, for in its report

---

[6] See Knauth "The American Law of Ocean Bills of Lading", (3d ed. 1947) at p. 121: "But it is plain that they are not a complete or closed code of law on the topic. The needs of world-wide commerce continue to demand a flexible document; and those details upon which agreement was not reached, and as to which there is no legislative expression, continue to be subjects of free contract adjustment between the interested parties."

[7] See pp. 30-32, *infra*.

the Senate Committee on Commerce said (Senate Report No. 742, 74th Cong. 1st Sess., dated May 13, 1935, at p. 4):

> "It also will accomplish real uniformity and agreement with many other nations as to the text of *those clauses* of ocean bills of lading *with which the bill deals.*" (Italics ours).[8]

In the Minutes of Evidence Taken before The British Joint Select Committee on the Carriage of Goods by Sea Act, July 3, 1923, at p. 128, Col. 1, Sir Norman Hill stated:

> "The bills of lading used may incorporate any additional terms that may be agreed to between the parties provided the specified minimum rights are not infringed."

It seems clear, therefore, that once the carrier meets its essential duties to the cargo owner as provided by the Act, it may contract as to any other matter. This was demonstrated beyond question by the decision of *The Campfire*, 156 F. 2d 603 (2d Cir., 1946). It was there held that the Act does not prohibit or constrain all contracts but only those that lessen the carrier's liability in a manner not authorized by any provision of the Act. In that case the Court of Appeals for the Second Circuit held invalid a *pro rata* valuation clause upon the ground that it lessened the carrier's liability in a manner not authorized by the Act. The Court did not decide that since a *pro rata* clause was not covered by the text of the Act it automatically followed that the clause was prohibited. On the contrary, the Court's decision was that the *pro rata* clause was void because it lessened the carrier's liability as prescribed by the Act. Before it considered

---

[8] This statement was quoted with approval by the House Committee on Merchant Marine and Fisheries (House of Representatives Report No. 2218, 74th Cong. 2nd Sess., dated April 23, 1936, at p. 4).

whether the clause was invalid, the Court first determined that the Act expressly contained a provision with respect to measuring the carrier's liability. The Court then resolved that the *pro rata* clause measured the carrier's liability contrary to that provision of the Act. That being so, "to give effect to the *pro rata* clause would 'lessen' the carrier's liability in a manner not authorized by any provision of 'this chapter' " (156 F. (2) at p. 605). See also concurring opinion of Judge Chase in *Balfour, Guthrie & Co. v. American-West African Line*, 136 F. 2d 320 at p. 323 (2d Cir., 1943); *Scarburgh v. Compania Sud-Americana De Vapores*, 174 F. 2d 423 (2d Cir., 1949); *The Vermont*, 47 F. Supp. 877, 879 (E. D. N. Y. 1942).

a. *Congress never intended to preclude the parties from contracting between themselves to alter the indirect results of the Chattahoochee decision.*

The Both-to-Blame Clause is of significance only in suits in the United States, because only in the United States has cargo, in a mutual fault collision, been permitted to recover the full amount of its damages from the non-carrying vessel. Other maritime nations, including Great Britain, Canada, Mexico, Brazil, Argentina, Uruguay, and the nations throughout Europe, have adopted the rule of the Collision Convention of 1910, which restricts the recovery of cargo owners in proportion to the fault of the non-carrying vessel. *Knauth, The American Law of Ocean Bills of Lading* (3d ed. 1947) 176.

The Senate Committee on Foreign Relations, when in 1939 it considered ratification of the Collision Convention of 1910, denounced the indirect result of the rule of *The Chattahoochee* as contrary to the public policy stated in both the Harter Act and the Carriage of Goods by Sea Act. Similar statements are contained in the report of Secretary

of State Hull, which was concurred in by the late President Franklin D. Roosevelt. These may be found in 1939 A. M. C. 1051, *et seq.* The Senate Committee said (1939 A. M. C. at pp. 1055-1056):

> "As noted above, *in one important respect the policy underlying the Harter Act has never, in fact, become effective in the courts of the United States.* The decision of the Supreme Court in the *Chattahoochee case* allows the owners of cargo damaged or lost in collisions, where both ships are to blame, to sue the noncarrying vessel for the entire cargo damage; but, pursuant to the doctrine of contribution of admiralty law, permits the noncarrying vessel to collect from the carrying vessel one-half of the damage which the former was required to pay. In other words, although the Harter Act prevents the cargo owners from recovering directly from the carrying vessel when at the beginning of the voyage that vessel was seaworthy, properly manned and equipped, and the cargo properly stowed, that vessel may be compelled eventually, in the case of a both-to-blame collision, to pay half of the damage sustained by its own cargo regardless of the degree of fault of the vessel." (Italics ours).

Concededly, the statements by our Executive and Legislative departments were made after the passage of the Carriage of Goods by Sea Act and in conjunction with a Convention that was not ratified. But they are none the less of significance for they serve to corroborate the fact that the indirect result of the rule of *The Chattahoochee* have not been favorably received, and that the anomalous situation which it has caused is in need of correction.

It is one thing to say that Congress has not affrmatively acted to remedy that situation apart from what the parties may have contracted. It is another thing to contend that,

with knowledge of its existence, Congress deliberately precluded the parties from contracting between themselves to correct it.

The District Court agreed that the Both-to-Blame Clause

> ". . . corrects the anomalous result of the operation of the *Chattahoochee* and *Atlas* rules which led shipowners 'to adopt extraordinary precautions to avoid being sued in the United States and has also given rise to some remarkable efforts to gain the advantage of the American Rule.' Knauth, Ocean Bills of Lading, 176 (3d ed. 1947), see 176-7 for illustration" (R. 113).

It is contended that the failure of the Senate to ratify the Collision Convention of 1910 indicates that it was content to let the indirect results of *The Chattahoochee* remain and that therefore the Both-to-Blame Clause is invalid. This, however, is clearly a *non sequitur*.

Concededly, the Collision Convention of 1910 would have changed in part, by operation of law and without the necessity of contract, the direct as well as the indirect results of *The Chattahoochee* decision by providing that damage to cargo should be borne by the vessels at fault, without joint or several liabilities towards the third parties (Article 4). Under the convention, assuming an equal fault collision, cargo would recover only fifty percent from the non-carrying vessel, and it could not recover the other fifty percent of its damages from the carrier because of the Carriage of Goods by Sea Act's exemption to the carrier from responsibility for negligent navigation. Thus, cargo would collect only 50% of its damage from the non-carrying vessel.

In so far as the relationship between cargo owner and carrier is concerned, this is the practical result of the Both-to-Blame Clause.

The Collision Convention of 1910 went much further. Among other things, it adopted the rule of proportional fault, as distinguished from half damages in both-to-blame collisions. This latter provision was objectionable to various interests.

Moreover, there are numerous reasons apart from rights of cargo which indicate why the Senate has not ratified the Collision Convention.[10]

Clearly, the failure to ratify the Collision Convention is no indication that the Senate intended that any contract remedying the anomalous situation indirectly produced by the *Chattahoochee* decision should be invalid. As long as

---

[10] One of the most important is that it affected the rights of passengers and crews and was objectionable to the labor unions. See brief filed on behalf of National Organization of Masters, Mates and Pilots of America, Hearings before Subcommittee of the Committee on Foreign Relations, 75th Cong. 3rd Sess. (1938) at p. 439. In addition, the Collision Convention only affected collisions between foreign vessels or between an American vessel and a foreign vessel, and did not change the basic American law with respect to collisions between two American vessels. It, therefore, left American vessels subject to a different law with respect to collisions from the law applicable to foreign vessels, thereby adding to a lack of uniformity. See statement on behalf of the American Steamship Owners' Association of New York, Hearings before Subcommittee of the Committee on Foreign Relations, 75th Cong., 3rd Sess. (1938) at p. 176.

Furthermore, the commercial interests strenuously objected to our domestic law respecting collisions being modified by a Treaty and not in the usual way by an Act passed by both Houses of Congress. See letter of the Maritime Association of the Port of New York, dated January 10, 1938, Hearings before Subcommittee of the Committee on Foreign Relations, 75th Cong., 3rd Sess. (1938) at p. 439.

The Treaty was also objected to because it changed the rule laid down by the Supreme Court in *The Pennsylvania*, 19 Wall. 125 (1873). One of the main groups of objectors was the American steamship owners.

The trouble with the Treaty was that it covered a multitude of controversial and domestic features and attempted to have them enacted into law by means of a Treaty instead of by usual Congressional action before both Houses. Even the Brussels Convention of 1924 dealing with The Hague Rules was not formally ratified until the Carriage of Goods by Sea Act became law.

that rule prevails, the only recourse of a shipowner is to seek relief by contractual provision. The failure of the Senate to ratify the Collision Convention indicates, at the best, that it has not disturbed the indirect results of the rule of *The Chattahoochee*, namely, that under similar provisions of the Harter Act, which are not self-executing, a carrier, *in the absence of contract*, may be held indirectly responsible to the cargo owner because of the right of the non-carrying vessel to recoup the damages which the latter pays to the cargo owner.

b. *Congress not only failed to use language which can reasonably be construed to invalidate the Clause, but, in fact, it failed to adopt the proposed Englar amendment to the Act which would have explicitly prohibited the Clause. That action of Congress must be regarded as a deliberate refusal to invalidate the Clause.*

In the Hearings before the Commerce Committee (74th Congress, 1st Session, May 10, 1935, S. 1152), Mr. Englar on behalf of the cargo underwriting interests specifically requested that §4(3) of the Act be amended so as to read:

> "The shipper *or owner of the goods* shall not be responsible for loss or damage sustained, *or liability therefor incurred*, by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants. *Any clause or stipulation which seeks to impose liability contrary to the foregoing shall be null and void, including any clause or stipulation requiring the owner of cargo to indemnify the ship or carrier against liability to a colliding vessel for any part of the collision damages paid or payable by such colliding vessel.*" (Suggested new matter by Mr. Englar in italics).

Congress, while it amended the Bill in other respects,[11] refused to adopt the Englar amendment.

Congress held extended Hearings dealing with the Englar amendment where numerous persons representing the cargo owners' as well as the shipowners' interests appeared and testified. Discussions were had with reference to the Englar amendment before the Senate as well as the House of Representatives. (Hearings Before Commerce Committee 74th Cong. 1st Sess., S. 1152 (1935), 52-55, 61 *et seq.*, Hearing Before Committee on Merchant Marine and Fisheries, 74th Cong. 2nd Sess., S. 1151 (1936) 49-50; 63-65; 87). The entire circumstances surrounding the use of the Clause were revealed to Congress and it was made aware of the anomalous situation indirectly produced by the *Chattahoochee* decision. The arguments of the cargo underwriters against the use of the Clause were also presented to Congress.

If Congress had intended to prohibit a Both-to-Blame Clause, it would have been very simple to have so provided in the Act. The question was directly presented to Congress by the proposed Englar amendment, which was not accepted. The fact that Congress did not so provide is convincing evidence that it did not intend to prohibit such

---

[11] In a memorandum prepared by the Department of State on June 5, 1937 (51 Stat. 269) the amendments to the Act are discussed and are compared with the text of the Act as approved by the Convention. This may be found in Appendix H of *Knauth, The American Law of Ocean Bills of Lading*, (3d ed. 1947) 270. The amendments made by Congress were not intended to conflict with the provisions of the Convention. This is clearly indicated by the correspondence between the United States Department and the Italian Government, in which the State Department said: "It was the intention of this Government that the Carriage of Goods by Sea Act should bring the American statute law as to ocean bills of lading into accord with the Brussels convention and that it should not contain any provisions that would interfere with substantial compliance with the provisions of the convention on the part of the United States." See Knauth, *supra*, pp. 277-278.

Clauses, particularly having in mind the long approved practice of using Both-to-Blame Clauses and the fact that the cargo underwriters specifically requested that such Clauses be prohibited.[12]

It is well settled that the failure of Congress to adopt a proposed amendment is a circumstance which may be considered in construing the legislative intent as not embracing the scope of the language rejected. This was forcibly expressed in *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184 (1912),[13] at p. 198:

> "The fact that this provision measuring the amount of recovery by rebate was omitted from the Act, as finally reported to both Houses and passed, is not only significant, but so conclusive against the contention of the plaintiff that it quotes—not the report of the conference committee—but a statement, made by a member of the Senate Conference Committee, to support the present argument that §8 means the same thing as the omitted clause."

---

[12] In 23 Virginia Law Review (1937) at pages 595-596, f.n. 28, it is said: "Section 4(3) exempts the *shipper* from liability for 'loss or damage sustained by the carrier or the ship arising or resulting from any cause without the *act, fault* or *neglect* of the shipper, his agents, or his servants'. (Italics supplied.) A controversy arose in connection with this section while the Act was pending before Congress, the point in dispute being its applicability to 'both-to-blame collision clauses' introduced by shipowners into bills of lading as a result of the decisions of the United States Supreme Court in *The Chattahoochee*, 173 U. S. 540 (1899) and *Aktieselskabet Cuzco* v. *The Sucaresco*, 294 U. S. 394 (1935).

The conclusion seems to have been that the section does not affect the legality of such clauses in bills of lading. See Statement of W. J. Nunnally, Jr., in *Hearing before Committee on Merchant Marine and Fisheries on S. 1152*, 74th Cong., 2d Sess. (1936) 49-53; Statement of Ira A. Campbell, *id.* 53-59, 63-65; Statement of Arnold W. Knauth, *id.* 87."

[13] See also *Keystone Mining Co.* v. *Gray*, 120 F. 2d 1, 10 (3d Cir., 1941); *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52, 58 (8th Cir., 1940); *United States* v. *United Shoe Machinery Co.*, 264 Fed. 138 at p. 174 (E. D. Mo., 1920), affirmed 258 U. S. 451.

It is submitted that the failure of Congress to amend the Act so as to specifically prohibit the Clause, establishes that the bill, as enacted, was not intended to prohibit the Clause.

The clauses which Congress determined should be prohibited are specified in §3(8), discussed below. The Both-to-Blame Clause following full discussion was not forbidden.

POINT IV.

SECTION 3(8) OF THE ACT INVALIDATES ONLY THOSE CLAUSES WHICH LESSEN THE CARRIER'S DEFINED LIABILITY "OTHERWISE THAN AS PROVIDED IN THIS CHAPTER". THE BOTH-TO-BLAME CLAUSE BY EXPLICIT TERMS OPERATES ONLY WHERE A COLLISION OCCURS AS A RESULT OF NEGLIGENT NAVIGATION. THE ACT EXPRESSLY RELIEVES THE CARRIER FROM ALL LIABILITY UNDER SUCH CIRCUMSTANCES. SINCE THE CLAUSE APPLIES ONLY WHERE THE CARRIER IS NOT LIABLE, IT DOES NOT FALL WITHIN THE PROHIBITION OF THE SECTION.

The agreements which are invalidated by §3(8)[15] are those which reduce the obligations of the carrier to the cargo owner enumerated in that section or which "lessen *such* liability otherwise than as provided by the Act". *The Campfire*, 156 F. 2d 603 (2d Cir., 1946), discussed pp. 22-23, *supra*.

---

[15] That section provides:

"Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening *such liability* otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability." (Italics ours).

In *Scarburgh* v. *Campania Sud-Americana De Vapores*, 174 F. 2d 423 (2d Cir., 1949) the history of the Carriage of Goods by Sea Act was reviewed and it was stated once more that the only clauses which the Act prohibits are those which lessen the carrier's defined liability to the cargo owner. At page 424 it was said:

> "The Carriage of Goods by Sea Act of 1936 • • • expresses our adherence to the Brussels Convention of 1924, embodying substantially the provisions of the earlier Harter Act of 1893 • • •. The purpose of the Act was to carry over into the international sphere the uniformity achieved for American voyages in the Harter Act by mitigating the common-law 'insurer's' liability of carriers, *in exchange for a prohibition of clauses in the contract of carriage lessening the carriers' liability.* • • •" (Italics ours).

Since the Both-to-Blame Clause applies only where there is no liability by the carrier to the cargo owner, the Clause is not one "lessening such liability otherwise than as provided in this chapter." The District Court's opinion makes this clear (R. 107-108).

By its own terms, the Clause applies only where a collision occurs as a result "of any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship." That language is verbatim with the wording of §4-2a of the Carriage of Goods by Sea Act which exonerates the carrier from liability for loss or damage occurring under those circumstances. It is in those instances alone where the Act itself completely exonerates the carrier that the Clause operates.

A Both-to-Blame Clause, therefore, cannot be deemed within the prohibition of §3(8). In that respect §3(8) is

clear, because it speaks of lessening the carrier's defined liability "otherwise than as provided in this chapter." The chapter expressly relieves the carrier from liability to the cargo owner because of negligent navigation. Insasmuch as the carrier is not liable, surely there can be no "lessening" of this non-existent liability.

POINT V.

THE BOTH-TO-BLAME CLAUSE IN NO WAY CONFLICTS WITH THAT PORTION OF §3(8) OF THE ACT WHICH PROHIBITS USAGE OF "BENEFIT OF INSURANCE" OR SIMILAR CLAUSES.

The prohibition against "benefit of insurance" clauses does not invalidate a Both-to-Blame Clause, for a Both-to-Blame Clause is not similar to a "benefit of insurance" clause. This District Court so held (R. 108-109).

The only purpose of a "benefit of insurance" clause was to enable a carrier, who had been guilty of a breach of one of its essential duties, to claim any insurance which the cargo owner had effected. In other words, a "benefit of insurance" clause enabled the carrier to escape all liability to the cargo owner, including liability because the vessel was unseaworthy or because the shipowner had failed to exercise due diligence in manning the vessel or because the shipowner failed to load, carry, or deliver the cargo properly.

This "benefit of insurance" clause provided:

> "In case of any loss, detriment, or damage done to or sustained by said goods or any part thereof for which the carrier shall be liable to the shipper, owner, or consignee, the carrier shall to the extent of such liability have the full benefit of any insur-

ance that may have been effected upon or on account of said goods."

This clause was held valid even before the Harter Act. *Phoenix Insurance Co.* v. *Erie and Western Trans. Co.*, 117 U. S. 312 (1886). Since most cargo owners insure their cargoes against risks which include the carrier's negligence in performing its essential duties, the effect of the clause was that the carrier would be reimbursed by the underwriters for any payments made by it where the cargo had been damaged because of the negligence of the carrier in performing its essential duties and for which the carrier was directly responsible to the cargo owner. To overcome this, the underwriters would insert a provision in their policies relieving them from such risks where bills of lading contained benefit of insurance clauses. They adopted the practice of making payment to the cargo owners under a "loan receipt". This arrangement was held by the Supreme Court not to constitute "payment of insurance", so that the carrier was not entitled to the benefit of it. *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139 (1918). The practical effect of this decision was to destroy the clause, for its use thereafter was valueless.

It is contended that if the Act condemns a comparatively harmless benefit of insurance clause which would relieve the carrier from his liability to the cargo owner for negligent damage to cargo, then the Both-to-Blame Clause must also be condemned. This is another illustration of the cargo owners' failure to understand that the Harter Act and the Carriage of Goods By Sea Act "undoubtedly modify the public policy as previously declared by the courts" (*The Irrawaddy*, 171 U. S. 187, 193, *supra*), in that by operation of law they relieve the carrier from its liability to the cargo owner for damage to cargo

caused by negligent navigation or management, which are the only circumstances in which the Both-to-Blame Clause operates.[16]

There is no resemblance between a Both-to-Blame Clause and a "benefit of insurance" clause. A "benefit of insurance" clause operates only where the carrier is directly liable to the cargo owner and, thus, it would affect the essential duties imposed by the Act upon the carrier. On the other hand, a Both-to-Blame Clause operates only in those instances where the carrier is not liable to the cargo owner and, thus, it in no way affects the essential duties imposed by the Act upon the carrier.

POINT VI.

SECTION 4(3), 46 U. S. C. A. §1304(3), WHICH PROVIDES THAT A SHIPPER IS NOT RESPONSIBLE FOR LOSS OR DAMAGE SUSTAINED BY A CARRIER OR THE SHIP EXCEPT WHERE CAUSED BY THE ACT, NEGLECT OR FAULT OF THE SHIPPER, CANNOT BE CONSTRUED TO PROHIBIT A BOTH-TO-BLAME CLAUSE.

The anomalous situation resulting from the *Chattahoochee* decision was directly presented to Congress when it enacted the Carriage of Goods by Sea Act. Congress was

---

[16] The argument that the Clause requires the cargo owner to become an insurer for the carrier and it is, therefore, unjust because he is required to seek re-insurance, is also without merit. The Clause does not require the cargo owner to make any original payment to the carrier. He has been paid, and one-half or some other portion of that payment ultimately has come from the carrier. Under the Clause the cargo owner merely promises to return to the carrier whatever amount the cargo owner has received from the non-carrying ship which the non-carrying ship has collected from the carrier.

Nor is there any merit to the suggestion that the cargo-owner must resort to re-insurance. Clause 25 of the standard cargo policy covers obligations which the cargo owner may have assumed under a Both-to-Blame Clause, and provides: "Where goods are shipped under a bill of lading containing a so-called 'Both to Blame Collision' Clause these Assurers agree, as to all losses covered by this insurance, to indemnify the Assured for any amount (up to the

also aware that the Both-to-Blame Clause, then in use, overcame by contract the indirect consequences of the *Chattahoochee* decision. Accordingly, it is reasonable to suppose that if Congress had intended to preclude the parties from contracting so as to overcome the indirect results of that decision, it would have used clear and unambiguous language. There is no such language in the Act. The conclusion seems inescapable, especially when it is considered that the proposed Englar amendment explicitly invalidating the Clause was not accepted by Congress (See pp. 27-30, *supra*), that Congress did not intend to and did not, in fact, prohibit the use of the Clause.

Moreover, if §4(3) of the Carriage of Goods by Sea Act is held to vitiate the Both-to-Blame Clause, then a further anomalous situation will result, since §4(3) is not contained in the Harter Act. It must be remembered that the provisions of the Harter Act remain controlling with respect to non-foreign commerce. If Congress had intended to prescribe a different rule with respect to bills of lading in foreign trade, it would seem reasonable that Congress would have expressed itself in clear terms. For this Court to hold that §4(3) invalidates Both-to-Blame Clauses would result in the Court's announcing a rule which would not be applicable to the bills of lading controlled by the Harter Act. Both-to-Blame Clauses in bills of lading controlled by the Harter Act would be valid while Both-to-Blame Clauses contained in bills of lading controlled by the provisions of the Carriage of Goods by Sea Act would be invalid. Certainly, if such inconsistent rules were meant to be prescribed by Congress, it would have said so in clear language. It did not do so.

---

amount insured) which the Assured may be legally bound to pay to the shipowners under such clause. In the event that such liability is asserted the Assured agree to notify the Assurers who shall have the right, at their own cost and expense, to defend the Assured against such claim."

a. *Section 4(3) is concerned solely with loss or damage suffered by a carrier or ship which is unrelated directly or indirectly to cargo damage.*

To say that the "cargo damage" because it is brought about by a collision, is *transmuted* into "collision damage" is to indulge in nothing more than a play on words.

True, the cargo damage results from the collision. Because of that the cargo owners imply it becomes part of a "collision liability." No Court, however, has ever held that because the cargo damage is recovered from the non-carrying vessel it loses its identity of "cargo damage." While it is an item of damage suffered by the non-carrying vessel because of the collision, the item of damage is none the less a "cargo claim" which the non-carrying vessel has satisfied.

What the non-carrying vessel pays is "cargo damage" resulting from the collision and it is that "cargo damage" which the non-carrying vessel recoups from the carrier. There is no physical *transmutation* of the "cargo damage" into "collision damage" because the liability which is imposed results from the collision. The non-carrying vessel does not claim its payment as a hull loss or as any loss other than a loss suffered because of its payment of "cargo damage."

The Court of Appeals in its opinion (R. 143) recognized that the divided damage rule results in the cargo owner "indirectly" recovering a portion of his loss from the carrier.[17]

---

[17] This is in accord with the decision of this Court in *Great Lakes Corp.* v. *S. S. Co.*, 301 U. S. 646 (1937), and with the prior decisions of the Court of Appeals for the Second Circuit. In *The Cockatoo*, 61 F. 2d 889 (2d Cir., 1932), it was said at p. 892: "In reason it can make no difference whether the noncarrying vessel recoups itself out of money due from the carrying vessel as was done in The Chattahoochee or recovers the amount of contribution affirma-

Clearly, the subject matter of the loss or damage covered by the Both-to-Blame Clause relates to damage *to* cargo. Section 4(3) does not deal with damage *to* cargo. That section deals with damage *by* cargo. Loss or damage to cargo is covered specifically in words of one syllable by §4(2), and provides that the carrying ship shall not be responsible for this loss or damage. Section 4(3) in no way supplements §4(2) but is concerned solely with loss or damage suffered by a carrier or vessel which is unrelated, directly or indirectly, to damage to cargo.

b. Section 4(3) applies only to loss or damage caused by cargo and was intended merely to re-state existing law that where a ship had been damaged by cargo, the responsibility for the damage and loss cannot be imputed to the shipper without some dereliction of duty on his part.

Section 4 (3) merely re-states existing law that a shipper generally is not liable for loss or damage caused by its cargo without some act, neglect or fault on its part, while other provisions of the Act make exceptions to that general rule.

---

tively as in Erie R. R. Co. *v.* Erie Transportation Co. In either case the property of the noncarrying vessel is used to liquidate one-half the claim of the cargo, and *by either mode of satisfying the claim the carrying vessel is subjected (whether directly or not) to liability for one-half the damages suffered by the cargo.*" (Italics ours).

In *New York & Cuba Mail S. S. Co.* v. *Amer. S. S. O. Mut. P. & I. Ass'n*, 72 F. 2d 694 (2d Cir., 1934), the Court, in construing a policy of marine insurance, held that a carrier in a mutual fault collision case, charged with an item of cargo damage by the noncarrying ship, suffered a loss "in respect to cargo". While it was held that the carrying vessel, *The Mexico*, did not suffer a "liability" unless in the final adjustment of accounts it would be obliged to make a payment to the non-carrying ship, the decision recognized that the carrier had sustained "a loss in respect to cargo." At p. 697, the Court, referring to the carrier, said: "Now the owners of The Mexico have sustained a loss in respect of its cargo. * * *".

While the purpose of the Hague Rules of 1921 on which the Carriage of Goods by Sea Act is founded was to unify *certain* rules relating to bills of lading, it was not intended that existing Anglo-American law was to be altered in all respects.

A cargo owner's lack of responsibility to his carrier or to others for loss or damage caused by his cargo except where there has been some dereliction of duty on his part is basic Anglo-American law. Cf. *The Victor* (1860) 2 *Law Times* 331, cited with approval in *The Atlas*, 93 U. S. 302, 311 (1876). Section 4(3) intended merely to re-state this general law. This is demonstrated by an absence from the historical record surrounding the Hague Rules of any indication that an existing evil was intended to be remedied by this section. These reports contain nothing to indicate that §4(3) was intended to do anything but express the existing Anglo-American law.

That §4(3) was not intended to grant new rights is further evidenced by the wording of the section, which absolves merely the shipper from responsibility and does not include the consignee or others who may actually own the cargo. If new rights were intended, what possible reason would there have been to restrict them to the shipper? Undoubtedly the word *shipper* was used without objection because the section created no new rights but merely re-stated the existing Anglo-American law which imposed no responsibility upon the owner of cargo—shipper, consignee or otherwise—for loss caused by cargo without some fault upon the part of the cargo owner.

In summary, §4(3) applies only to loss or damage caused *by* cargo. It does not cover damage *to* cargo. If, because of the cargo, the ship suffers damage or the carrier suffers loss because of damage to other cargo, then the shipper

shall not be responsible, except when the shipper's act, fault or neglect contributed to the loss or damage.

The cargo owner having collected, by indirection, from the carrying ship fifty percent or other portion of the loss or damage to its cargo in circumstances where the carrying ship is by statute immune from liability, the question in its final analysis is reduced to whether the cargo owner, in the face of an agreement to the contrary, may keep in its pocket that part of the loss or damage to its cargo which it has succeeded by indirection in collecting from the carrying ship. We submit that the Clause, which implements the legislative policy that carriers should not and that cargo owners should bear the risk of damage to cargo due to the carrier's negligent navigation by its servants, is valid, and that §4(3) does not relieve the cargo owner from its contract to repay this item of cargo damage, because §4(3) is not concerned with a loss relating to cargo damage.

CONCLUSION.

FOR THE FOREGOING REASONS, THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED.

Respectfully submitted,

CLETUS KEATING,
Counsel for Respondent Belgian Overseas Transport, S. A., owner of the MV. *Esso Belgium*.

EDWIN S. MURPHY,
LOUIS J. GUSMANO,
Of Counsel.

LIBRARY
SUPREME COURT, U.S.

FILED
MAR 3 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 450.

UNITED STATES OF AMERICA,

Petitioner,

—against—

ATLANTIC MUTUAL INSURANCE COMPANY, FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., *ET AL.*,

Respondents.

BRIEF FOR RESPONDENTS FARR SUGAR CORPORATION AND AMERICAN SPIRITS, INC.

LEONARD J. MATTESON,
Counsel for Respondents, Farr Sugar Corporation and American Spirits, Inc.

BIGHAM, ENGLAR, JONES & HOUSTON,
OSCAR R. HOUSTON,
RICHARD F. SHAW,
JULIAN S. GRAVELY, JR.,
Of Counsel.

INDEX.

	PAGE
Brief for Respondents Farr Sugar Corporation and American Spirits, Inc.	1
Opinions Below	1
Jurisdiction	1
Statutes Involved	2
The Question Presented	2
Statement	5
The Opinion of the Court of Appeals	7
Argument	8
Preliminary	8
I—The Both-to-Blame clause is not consensual	8
(a) The cargo owners are faced with a united front of all steamship owners acting in concert seeking to impose the clause upon them	9
(b) To permit enforcement of the Both-to-Blame clause would be to allow the shipowners to become legislators and to compel cargo owners to surrender their rights against a negligent non-carrier as no statute has done	10
II—The Both-to-Blame clause is not supported by the Harter Act or the Carriage of Goods by Sea Act and is contrary to public policy	11
(a) The right of the innocent cargo owner to a full recovery from the non-carrier is clear	11

PAGE

(b) The right of the non-carrier against the carrier is for a division of the damages of the respective vessel owners arising from the collision and the carrier's liability corresponds 12

(c) The claim of the carrier against the cargo owner under the Both-to-Blame clause 14

(d) There is no recovery by cargo against the carrier and no statutory scheme has been infringed 15

(e) No division of damages between the vessel owners should be permitted to affect the cargo owner's right to a full recovery from the negligent non-carrier 17

(f) The Both-to-Blame clause is of necessity an indemnity, not an immunity, clause 21

(g) The demand of the carrier on the cargo owners for an indemnity against the carrier's tort liability to another is unreasonable 22

(h) The *Jason* clause is not an indemnity clause 24

(i) There is no policy indicated in the Harter Act which supports the Both-to-Blame clause 26

(j) The Carriage of Goods by Sea Act goes no further 29

(k) The Both-to-Blame clause violates the stated purposes of the Carriage of Goods by Sea Act 33

PAGE

(l) The Both-to-Blame clause is an attempt by shipowners to secure the distribution of cargo losses accomplished in certain foreign countries by the Brussels Collision Convention, 1910, on principles rejected here, rather than in accord with any principle adopted by the Acts. Any such change is for Congress, not the shipowners, to make 36

III—The Both-to-Blame clause is contrary to the specific provisions of Section 4(3) of the Carriage of Goods by Sea Act and is therefore unenforceable 39

Conclusion 44

Comment on Brief for Respondent Belgian Overseas Transport, S. A., Owner of M. V. "Esso Belgium" 45

(a) The Brief for the "Esso Belgium" makes it abundantly clear that the objective of the Both-to-Blame clause is to obtain for shipowners the substantial equivalent of the limitation of cargo rights obtained in foreign countries through the Brussels Collision Convention 45

(b) The assertion that a carrier may contract "as he pleases with a cargo owner, provided the essential duties owed to the cargo owner by the carrier are not reduced by the contract" is clearly fallacious 47

Appendix 51

Harter Act, 1893 51

Carriage of Goods by Sea Act, 1936 53

PAGE

Excerpt from Report of Hearing Before the Committee on Commerce, United States Senate, 74th Congress, 1st Session, on S. 1152, A Bill Relating to Carriage of Goods by Sea, May 10, 1935, pp. 51-59 64

TABLE OF CASES CITED:

Aktieselskabet Cuzco v. *The Sucarseco* (1935), 294 U. S. 394 ..... 13, 25

American Mut. L. Ins. Co. v. *Matthews*, 2 Cir., 182 F. 2d 322 ..... 22, 28

Ansaldo San Georgio I v. *Rheinstrom Co.*, 294 U. S. 494 ..... 9, 22

Atlas, The (1876), 93 U. S. 302 ..... 2, 11, 18, 20, 23, 37, 37n, 46

Carib Prince, The, 170 U. S. 655 27

Catherine, The (1854), 17 How. 169 ..... 12, 27

Chattahoochee, The (1899), 173 U. S. 540, 2, 3, 12, 16, 18, 20n, 26, 27, 28

Delaware, The (1896), 161 U. S. 459 ..... 2, 26

Drumlanrig, The (1910), Prob. 249 ..... 37n

Erie R. R. Co. v. *Erie & Western Trans. Co.* (1907), 204 U. S. 220 ..... 13, 34n

Express Co. v. *Caldwell*, 21 Wall. 264 22

Geo. W. Roby, The, 6 Cir., 111 Fed. 601, cert. den. 183 U. S. 699 ..... 17, 27

Great Lakes Transit Corp. v. *Interstate S. S. Co.*, 301 U. S. 646 15

Halcyon Lines v. *Haenn Ship Ceiling Corp.*, Nos. 62 and 197, October Term, 1951, decided January 14, 1952 ..... 18, 38

PAGE

Inman v. *So. Car. Rwy. Co.*, 129 U. S. 128 ..... 35n
Irrawaddy, The, 171 U. S. 187 27

Jason, The, 2 Cir., 178 Fed. 414 ..... 24, 25
Jason, The, 225 U. S. 32 24

Kensington, The, 183 U. S. 263 ..... 22, 27

Liverpool Steam Co. v. *Phenix Ins. Co.*, 129 U. S. 397 .. 9, 22

May v. *Hamburg &c.*, 290 U. S. 333 27
Milan, The (1861), Lush Adm. 388 ..... 36, 36n, 37, 46

New York, 175 U. S. 187 ..... 34n
North Star, The (1882), 106 U. S. 17 2

Pan-Am T. & C. Corp. v. *The Campfire*, 64 F. Supp. 179, affd. 2 Cir., 156 F. (2d) 603, cert. den. 329 U. S. 774 ..... 8n

Railroad Co. v. *Pratt*, 22 Wall. 123 22
Ralli v. *Troop*, 157 U. S. 386 24

Stoomvaart etc. v. *P. & O. Navigation Co.* (1882), 7 App. Cas. 795 ..... 37n
Straus & Co. v. *Canadian Pacific Ry. Co.*, 254 N. Y. 407 9

Toluma, The, 2 Cir., 72 F. 2d 690, affirmed *sub nomine Aktieselskabet Cuzco* v. *The Sucarseco* (1935), 294 U. S. 394 25
Turret Crown, The, 2 Cir., 297 Fed. 766, cert. den. 264 U. S. 591 ..... 35n

Wildcroft, The, 201 U. S. 378 27

Other Authorities Cited:

PAGE

A. L. I. Restatement of the Law, Torts:
Section 875 12
Section 880 12

Brussels Collision Convention, 1910 .....20, 36, 37, 45, 46

Brussels Convention, 1924 40

Carriage of Goods by Sea Act (Act of April 16, 1936, 49 Stat. c. 229, 1207, 46 U. S. C., 1300 *et seq.*),
2, 3, 4, 7, 8n, 15, 16, 22, 33, 34, 35, 36, 38, 39, 41, 46
Section 1 (46 U. S. C. 1301) 53
Section 2 (46 U. S. C. 1302) 54
Section 3 (46 U. S. C. 1303) 54, 55, 56
Section 3(1) (46 U. S. C. 1303) 29
Section 3(8) (46 U. S. C. 1303) 35, 35n
Section 4 (46 U. S. C. 1304) 57, 58, 59
Section 4(3) (46 U. S. C. 1304),
7, 19, 22, 25, 29, 30, 35, 39, 40, 41, 42, 43
Section 4(6) 41
Section 5 (46 U. S. C. 1305) 25n, 35, 59, 60
Section 6 (46 U. S. C. 1306) 35, 60
Section 7 (46 U. S. C. 1307) 60
Section 8 (46 U. S. C. 1308) 61
Section 9 (46 U. S. C. 1309) 61
Section 10 (Repealed by Transportation Act, 1940, 54 Stat. 929) 61
Section 11 (46 U. S. C. 1310) 61
Section 12 (46 U. S. C. 1311) 62
Section 13 (46 U. S. C. 1312) 62
Section 14 (46 U. S. C. 1313) 62, 63
Section 15 (46 U. S. C. 1314) 63
Section 16 (46 U. S. C. 1315) 63

Comgdon on General Average, 2nd Ed. 167 24

PAGE

English Maritime Conventions Act, 1911 37

Gregory, Contribution Among Tort-Feasors, A Defense, 54 Harv. L. Rev. 1170 ..... 19n

Hague Rules, 1922 39

Harter Act (Act of February 13, 1893, 27 Stat. 445, 46 U. S. C., 190-195) 2, 4, 11, 12, 13, 14, 15n, 16, 19, 22, 24, 25, 26, 27, 29, 38

Section 1 (46 U. S. Code, Sec. 190) 51

Section 2 (46 U. S. Code, Sec. 191) 51

Section 3 (46 U. S. Code, Sec. 192), 26, 27, 28, 36, 51, 52

Section 4 (46 U. S. Code, Sec. 193) 52

Section 5 (46 U. S. Code, Sec. 194) 52

Section 6 (46 U. S. Code, Sec. 195) 52

Section 7 (46 U. S. Code, Sec. 196) 52

Harvard Law Review, December 1951, Vol. 65, pp. 340-341 ..... 38n

Hearings Before Committee on Commerce, U. S. Senate, 74 Cong., 1st Sess. on S. 1152:

Pages 51-59 .....32, 64-77

Pages 53, 54 .....30, 31

Hearings Before Committee on Merchant Marine and Fisheries, House of Representatives, 74 Cong., 2d Session, on S. 1152, January 26, 1936 32

International Maritime Committee, Bulletin No. 57, London Conference, 1922, p. 480 40

International Maritime Committee, London Conference, October 11, 1922, Bulletin No. 57, pp. 476-479 ..... 25n

James, Contribution Among Tort-Feasors, A Pragmatic Criticism, 54 Harv. L. Rev. 1156 ..... 19n

Judicature Act of 1873 36

PAGE

Limited Liability Act (R. S. §4281, *et seq.* as amended, 46 U. S. C. 181, *et seq.*) 34

Longshoremen's and Harbor Workers' Compensation Act 18

Marsden on Marine Collisions, 9th Ed. 1934, p. 136... 37n

Report of 18th Conference, The International Law Association, pp. 178-200, Everett P. Wheeler....27, 28

Report of Hearings on Brussels Collision Convention, 1910, before a Subcommittee of the Committee on Foreign Relations, United States Senate, 75th Congress, January 10-14, 1938:
2nd Session:
Page 14 29
Pages 111-113 ..... 49n
Pages 158-159 ..... 49n
Page 408 .....20, 20n
3rd Session, p. 72, Charles C. Burlingham 28

Report of House Committee No. 2218 on S. 1152 33

Roscoe on Damages in Marine Collisions, 3rd Ed., pp. 20, 21 .....37n

Senate Report No. 742 on S. 1152 33

Stanford Law Review, February 1952, Vol. 4, No. 2, pp. 286, 288 .....20n, 25

Temperley's Carriage of Goods by Sea Act, 4th Ed.:
Pages 64-65 .....35, 42
Pages 66-67..... 42

W. S. A. Press Release, Apr. 18, 1942, N. Y. Times, Apr. 19, 1942, p. 8 9

24 Congressional Record:
Page 148 26
Pages 171-173 26

28 U. S. C. 1254(1) 1

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 450.

UNITED STATES OF AMERICA,

Petitioner,

—against—

ATLANTIC MUTUAL INSURANCE COMPANY,[1] FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., *et al.*,

Respondents.

BRIEF FOR RESPONDENTS FARR SUGAR CORPORATION AND AMERICAN SPIRITS, INC.

Opinions Below.

The opinion of the District Court for the Southern District of New York (R. 101) is reported at 90 F. Supp. 836. The opinion of the Court of Appeals for the Second Circuit (R. 135) is reported at 191 F. 2d 370.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on August 31, 1951 (R. 148). The jurisdiction of this Court is under 28 U. S. C. 1254(1).

---

[1] The incorporation in the captions of the Petition and of Petitioner's Brief of the name of Atlantic Mutual Insurance Company as a respondent is an error. Neither that company, nor any insurance company, has been proceeded against by the United States of America in this litigation or is a party with respect to the question in dispute.

Statutes Involved.

The pertinent portions of the Harter Act (Act of February 13, 1893, 27 Stat. 445, 46 U. S. C., 190-195) and of the Carriage of Goods by Sea Act (Act of April 16, 1936, 49 Stat. 1207, 46 U. S. C., 1300 *et seq.*) are set forth in the Appendix to this brief, *infra*, pages 51-63.

The Question Presented:

The Harter Act (1893) and the Carriage of Goods by Sea Act (1936) provided that common carriers of goods by sea, unlike other common carriers, should no longer be liable to the owners of the cargo carried for damage resulting from faults or errors of navigation.

These acts did not deprive the cargo owner of the right which he has to recover his damages in full from another vessel or owner proved negligent. *The Atlas* (1876), 93 U. S. 302, 317.

Neither did they affect the liability of one shipowner to another. *The Delaware* (1896), 161 U. S. 459, 474.

As between vessel owners in a case of collision when both are to blame, the rule in admiralty is that the damages suffered by them respectively are divided equally between them, the one suffering the least being decreed to pay to the other one-half of the difference between their respective losses sustained. *The North Star* (1882), 106 U. S. 17, 20.

In the case of *The Chattahoochee* (1899), 173 U. S. 540, 552-555, this Court held that, on establishing its right to such a division of damages, a non-carrier could include in its claim for its damages resulting from the collision the amounts paid or payable by it to the owners of cargo on the carrying vessel. This Court there rejected the contention that to permit the non-carrier to do so would result in a liability of the carrier for cargo damage contrary to the provisions of the Harter Act.

The principles of these decisions apply equally to cases under the Carriage of Goods by Sea Act.

The correctness of these decisions is not here in question for the parties have stipulated their respective rights and liabilities up to the point in dispute in accordance therewith (Pet. Brf. 42, fn. 24).

The carrier describes the result of the decision in *The Chattahoochee, supra*, as "anomalous" because it has the practical effect of shifting to him the burden of one-half the cargo damage, albeit in the form of a liability to the non-carrier for damage sustained by the non-carrier as a result of the collision. The carrier seeks to avoid this result by demanding from the cargo owner an indemnity against his liability to the non-carrier. It would thus compel the innocent cargo owner to give up to the carrier when negligent one-half of the recovery to which the cargo owner is unquestionably entitled from the non-carrier under our law.

The question presented is as to the validity of the so-called Both-to-Blame clause present in the bills of lading in this case (Par. 9, R. 58) through which the carrier seeks to accomplish this result.

The Both-to-Blame clause made its first appearance in ocean bills of lading about 1935, some 36 years after the decision in *The Chattahoochee, supra*, and is now in general use by practically all common carriers by sea to and from ports of the United States. Since the clause has never been enforced no established relationship is disturbed by the action of the Court of Appeals in declaring it void and unenforceable.

The Both-to-Blame clause would require the cargo owner suffering loss by reason of a collision for which both the carrier and another vessel owner are to blame to indemnify the carrier against all loss or liability to the other or non-carrying ship or owner in so far as such loss or liability represents damage suffered by the cargo owner recovered from the non-carrier and set-off, recouped or recovered by the non-carrier against the carrying ship or

owner as part of its claim against the carrying ship or carrier.[2]

Concededly the Both-to-Blame clause would have been invalid prior to the Harter Act. No support for the clause is suggested other than an alleged change in public policy said to have been brought about by that Act and continued by the Carriage of Goods by Sea Act.

The question is not, therefore, as stated by petitioner's counsel, whether the clause is prohibited by those Acts or contravenes the public policy expressed in those Acts. On the contrary, the question is whether any policy or authority can be found in those Acts which would justify the exaction of this clause from the cargo owner.

The precise questions presented to this Court are therefore:

> May a common carrier of goods by sea, by bill of lading clause, force a cargo owner to indemnify the carrier against the carrier's tort liability to another vessel owner, or force the cargo owner to relinquish to the negligent carrier one-half of the recovery to which the cargo owner is entitled from a non-carrier?
>
> Is the Both-to-Blame clause validated by any change of public policy brought about by the Harter Act and the Carriage of Goods by Sea Act?

---

[2] The exact text of the clause is as follows:

"9. If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier" (R. 58).

Statement.

There are two actions, consolidated in the interlocutory decree for convenience. The United States filed its libel as owner of the S. S. "Nathaniel Bacon" and bailee of the cargo laden thereon to recover the damages sustained by both as the result of a collision from the M. V. "Esso Belgium" (R. 7). Subsequently certain insurance companies as subrogees of some of the cargo owners intervened claiming the recoveries to which their assureds would otherwise have been entitled.

The owner of the "Esso Belgium" filed a cross-libel against the United States for its damages resulting from the collision (R. 28) and by amendment claimed as damages any sums which it might be required to pay on account of damage to cargo on the "Nathaniel Bacon" (R. 35). In the cross-action, the United States impleaded all the owners of cargo, insured or otherwise,[3] on the "Nathaniel Bacon" seeking indemnity pursuant to the Both-to-Blame clause (R. 40). Two of the cargo owners, Farr Sugar Corporation and American Spirits, Inc., filed an answer denying the validity of the clause.

It was stipulated that the collision occurred through negligence on the part of both vessels, that no loss sustained by any party was the result of any act, fault or neglect of the shippers, consignees, owners or insurers of cargo, and that the "Nathaniel Bacon" was properly stowed and seaworthy (R. 72). It was further stipulated that the two answering cargo owners sustained certain damage (R. 73), that their insurers were subrogated to their rights (R. 74), and that these insurers were entitled to recover the damages of the cargo owners insured by them in full

---

[3] 27 of the 112 cargo owners impleaded are not assureds of the intervening insurers and so far as appears were uninsured. As to these the United States is still libellant in its representative capacity, although it is also in the position of suing them for an indemnity under its petition.

from the "Esso Belgium" (R. 75). It was further stipulated that upon payment of these damages, the owner of the "Esso Belgium" was entitled to offset, recoup or recover a part thereof[4] from the United States, as owner of the "Nathaniel Bacon" (R. 75-76).

The rights of other parties to the litigation were agreed to be controlled by the disposition of the claims of the United States against Farr and American Spirits (R. 77-78).

It was also stipulated that the United States (War Shipping Administration) in the carriage of goods on the "Nathaniel Bacon" and the issuance of the bills of lading was engaged as a common carrier in the commercial carriage of merchandise by sea for hire (R. 77).

Upon a trial of the single issue the District Court held the Both-to-Blame clause valid (R. 101). An interlocutory decree was thereupon entered (R. 113) awarding the intervening cargo insurers their full legal damages in the action against the "Esso Belgium" (R. 119). The decree further provided that the sums determined to be so recoverable be treated as a part of the damages of the owner of the "Esso Belgium" and that, the damages of the respective vessel owners having been determined, the United States should have a decree against the owner of the "Esso Belgium" for the amount by which two-thirds of the damages of the United States exceeds one-third of the damages of the owner of the "Esso Belgium", or vice versa (R. 120). The United States was awarded an indemnity against the cargo owners as prayed for (R. 120).

Upon appeal the Court of Appeals reversed and directed that the provision for an indemnity be eliminated from the interlocutory decree which stands in all other particulars (R. 135-148).

---

[4] One-third in fact, since the vessel owners had reached an agreement on division of the damages between them on the basis of one-third-two-thirds instead of the usual equal division.

The Opinion of the Court of Appeals.

The Court of Appeals held that to permit the shipowner to overturn settled principles of our law in order to close an alleged gap in legislative benefits, and to require such a definite relinquishment of the rights given to cargo under our law, through the medium of a bill of lading clause lacking the necessary elements of a consensual agreement (R. 139-140), would be to allow the carriers to be legislators beyond present justification (R. 137). Any such change in the American rule is for Congress rather than for the courts and no such clause can be found reasonable without clear and direct authorization of law (R. 140). The American policy is quite clear and against the Both-to-Blame clause. This attempt to push the policy of legislation to a point where it has definitely not gone is in itself legislation (R. 145).

The Court of Appeals did not decide whether the Both-to-Blame clause violates specific provisions of the Carriage of Goods by Sea Act but found in those provisions additional evidence that Congress meant to grant the carriers only whatever benefits were explicitly set out in the legislation (R. 146).

The opinion of the Court of Appeals is, we submit, sound and well reasoned. Our argument will not only support this proposition but will add that the clause contravenes the specific policy and provisions of the Carriage of Goods by Sea Act, and in particular the provisions of Section 4(3).

ARGUMENT.

Preliminary.

The relationship of the parties is that of common carrier to cargo owner in the ordinary commercial carriage of merchandise by sea (R. 77). Although in this case the carrier was the War Shipping Administration, that Administration merely followed the practice of private commercial carriers in including the Both-to-Blame clause in its bills of lading.[5] In other pending cases the United States through other agencies is heavily interested as a cargo owner. In normal times the interests of the United States are principally as cargo owner and not as carrier.

It appears that the United States as carrier is insured against the liability here involved (R. 81). It was represented in the courts below by counsel for its insurers who also appear on the brief here.

I.

The Both-to-Blame clause is not consensual.

This Court has always recognized that the carrier and his customer do not stand on a footing of equality. The individual customer has no real freedom of choice. He has no alternative but to accept the bill of lading tendered or abandon his business. Therefore, this Court has not permitted carriers to insert unreasonable or improper stip-

[5] For WSA bill of lading clause declared to violate the provisions of the Carriage of Goods by Sea Act and to be "opposed to public policy" and therefore void, see *Pan-Am T. & C. Corp. v. The Campfire*, 64 F. Supp. 179, 183, affd. 2 Cir., 156 F. (2d) 603, cert. den. 329 U. S. 774.

ulations in their bills of lading. *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 441. See also *Ansaldo San Georgio I* v. *Rheinstrom*, 294 U. S. 494, 498; *Straus & Co.* v. *Canadian Pacific Ry. Co.*, 254 N. Y. 407, 412.

(a) *The cargo owners are faced with a united front of all steamship owners acting in concert seeking to impose the clause upon them.*

The situation with respect to the Both-to-Blame clause is unusually aggravated. Since 1935 when the Both-to-Blame clause was first introduced it has been generally adopted by practically all steamship companies doing business to and from the United States (R. 139). It has been in use by a combination of steamship companies known as the North Atlantic Freight Conference since 1937 (Pet. Brf. 5, fn. 3). It is spoken of as a standard provision of ocean bills of lading today (Pet. Brf. 11). Presented with such a united front by shipowners acting in concert, the individual shipper is obviously helpless.

In November 1942, at the time of these shipments, the War Shipping Administration completely monopolized American ocean shipping having requisitioned for operation all American cargo vessels (W. S. A. Press Release, Apr. 18, 1942, N. Y. Times, Apr. 19, 1942, p. 8). The Court of Appeals therefore quite appropriately said that at most the clause is consensual in name only (R. 139).

Nevertheless, petitioner has represented the clause as "a private consensual agreement" (Pet. Brf. 35; see also Petition 10, 15) and has stated that the question is only whether "the problem is one on which the parties are free to contract" (Pet. Brf. 8). Petitioner's counsel have gone so far as to select from the list of impleaded cargo owners from whom indemnity is demanded the names of nine large and well-known corporations and to comment that they do not believe that these corporations are quite so helpless as the Court below suggested (Pet. Brf. 31, fn. 20).

This is a wholly inadequate presentation. Actually of

the 112 respondents impleaded from whom indemnity is sought under the clause (R. 40-43), 19 are individuals and 12 (including a number of returning government employees) were shippers of household goods and personal effects ranging in value up to $4,000. Most of the remainder are obviously small business corporations or partnerships. According to the general average statement only 29 of the impleaded cargo owners had shipments valued at over $5,000 and 69 had shipments valued at under $2,500. Twenty-seven of the respondents impleaded were not assureds of the intervening insurance companies and so far as appears were uninsured.

We do speak for the large shippers, but we equally speak for the more numerous little shippers, insured or otherwise, whose shipments are to them probably more important. This Court's decision will determine the rights of all. Even the large shippers are helpless before the united front of carriers unless they are in a position to charter whole ships to distribute their products and collect their raw materials.

(b) *To permit enforcement of the Both-to-Blame clause would be to allow the shipowners to become legislators and to compel cargo owners to surrender their rights against a negligent non-carrier as no statute has done.*

The question is not whether the parties may agree. There is no element of willing consent to the clause. No shipper would advisedly agree to it. The Both-to-Blame clause is attempted to be forced upon them for the shipowner's advantage. The question is will the shipowners thus be permitted unilaterally to alter our fundamental law of collision liability and to require so definite a relinquishment of the rights given to innocent cargo owners against a negligent non-carrier under our law without legislative authority (R. 140). To permit them to do so would be to allow them to become legislators (R. 137). This is obviously a matter of policy for Congress to determine (R. 143).

II.

The Both-to-Blame clause is not supported by the Harter Act or the Carriage of Goods by Sea Act and is contrary to public policy.

Concededly the Both-to-Blame clause is invalid unless supported by some change in public policy brought about by the Acts.

The Both-to-Blame clause in terms demands that the cargo owner indemnify the shipowner against his liability to another shipowner for the claim of that other shipowner or carrier. It is conceded that neither act excuses the shipowner from that liability or gives him any immunity with respect to it (Pet. Brf. 41-42).

It is no accident that the clause is framed as an indemnity for it is conceded that the clause is necessarily and deliberately so cast because of the unquestioned legal principles on which the liability is based (Pet. Brf. 25). To state those principles clearly is not "semantic manipulation" (Pet. Brf. 44) which is the sole province of those who would distort or disguise those principles.

(a) *The right of the innocent cargo owner to a full recovery from the non-carrier is clear.*

Concededly the Harter Act deprived the cargo owner of his right to recover from the carrier his damages resulting from faults and errors in navigation. It did not deprive the cargo owner of his right against any other vessel or owner. As against such other vessel or owner the innocent cargo owner retained his right, unquestioned since *The Atlas* (1876), 93 U. S. 302, to recover his damages, in admiralty as at common law, in full upon proof of negligence of that other, and irrespective of any contention or proof by that other that

there was contributing fault on the part of another. This right innocent cargo owners have in common under our law with all innocent sufferers from the negligence of another. A. L. I. Restatement of the Law, Torts, §§875, 880. This is the only right that the cargo owners or intervening insurers have sought to enforce or enforced in this case. This is the first and primary leg of the "triangle" (Pet. Brf. 41 *et seq.*).

Petitioner's counsel concede that the cargo owners have this right. They further concede that the purpose and effect of the Both-to-Blame clause is to deprive the cargo owner of the benefit of this right "to the extent that the non-carrier is able to shift the burden of cargo loss to the carrier" (Pet. Brf. 42).

(b) *The right of the non-carrier against the carrier is for a division of the damages of the respective vessel owners arising from the collision and the carrier's liability corresponds.*

The negligent non-carrying vessel owner, having been held liable for all the cargo damage on this principle, naturally sought relief through action against the carrying vessel and proof that fault of that vessel contributed, invoking the principle of equal division of damages between vessel owners when both are negligent established by this Court in *The Catherine* (1854), 17 How. 169, 177, as the rule most just and equitable and best tending to induce care and vigilance in navigation on both sides.

In the case of *The Chattahoochee* (1899), 173 U. S. 540, the question arose as to whether the non-carrier, having established contributory fault on the part of the carrier, could include in its claim for its damages resulting from the collision the amount of its payments or liability to cargo on the carrying vessel in view of the provisions of the recently enacted Harter Act releasing the carrier from liability to the cargo owner. It was strongly argued by the carrier there that the non-carrier upon payment

of the cargo damage stood only in the cargo owner's shoes and that to permit the non-carrier to recover a part of his payments to cargo from the carrier would be to disregard and nullify the Harter Act (see p. 552). This Court rejected that argument and held that the sole object of the Harter Act was to modify the relations between the carrying vessel and her cargo and that it had no application to a division of damages between two vessels. The relations between the two vessels remain unaffected by this Act (p. 554).

In *Erie R. R. Co.* v. *Erie & Western Trans. Co.* (1907), 204 U. S. 220, this Court followed its decision in *The Chattahoochee*, and pointed out that the non-carrier's right to a division of its damages consisting of its payments to cargo on the carrying vessel does not stand on subrogation but is its own right. Liability to cargo is damage to the non-carrier arising directly from the tort as one of the consequences plainly to be foreseen. Since the non-carrier's recovery from the carrier is not for cargo damage but for its own injury, neither the bill of lading provisions nor the Harter Act have anything to do with the case (p. 226).

In *Aktieselskabet Cuzco* v. *The Sucarseco* (1935), 294 U. S. 394, 400-401, this Court reiterated and applied this principle.

The liability of the carrier, therefore, does not rest on any principle of contribution between joint tort feasors to a common liability, but on the admiralty principle of equal division between negligent shipowners in collision cases of the damages sustained by them respectively. Petitioner's counsel concede that the liability of the carrier is for damages sustained by the non-carrier as a result of the collision (Pet. Brf. 12, 13, fn. 5, 41-42; see also Petition 8 and 9, fn. 6, subd. 3).

This conception of the nature of the non-carrier's claim and of the liability of the carrier to the non-carrier has been faithfully followed in this case (Pet. Brf. 42, fn. 24). The interlocutory decree awards the intervenors a full

recovery against the "Esso Belgium" only (R. 119-120). The decree then provides that the recoveries by the intervenors shall "be treated as part of the damages of" the owner of the "Esso Belgium" for the purpose of striking a balance between "the damages of the respective vessel owners" and determining the liability of one for the equalizing balance between them (R. 120).

The second leg of the triangle is, therefore, that the non-carrier seeks and obtains from the carrier a division of their respective claims for damages resulting from the collision, and the non-carrier is allowed to include in his claim for such division the amount of his liability to the cargo because his claim for such amount is not a claim for cargo damage but for damages suffered by him arising directly from the tort (the carrier's negligence toward him) on the ground that this liability is one of the consequences of the collision plainly to be foreseen.

(c) *The claim of the carrier against the cargo owner under the Both-to-Blame clause.*

The third leg of the triangle develops when the carrier, having been compelled in the suit of the non-carrier to submit to a division of the damages of the respective vessel owners, and having failed to exclude from that division those damages of the non-carrier consisting of the non-carrier's payments to cargo because those damages are regarded, not as cargo damage but, as an independent injury to the non-carrier resulting directly from the carrier's tort to which the Harter Act is not applicable, nevertheless, seeks indemnity against his liability for these damages from the cargo owners under the Both-to-Blame clause, which it attempts to support on the ground that a liability to the cargo owner for cargo damage has been imposed. This position is untenable.

(d) *There is no recovery by cargo against the carrier and no statutory scheme has been infringed.*

Petitioner's counsel, forced to concede that the carrier's liability is a liability to the non-carrier for damages sustained by the non-carrier as a result of the collision, are forced in the next breath to argue that it is in effect something quite different, *i. e.*, an indirect liability *to the cargo owner* for cargo damage.[6]

Thus they assert with complete inaccuracy that the Both-to-Blame clause would only require the cargo to repay to the carrier such amount as "cargo has in effect recovered from its carrier as a result of the rules stated above" (Pet. Brf. 7). And the culminating statement of their brief is that,—"The plain fact is that respondents [cargo owners] would require a carrier to bear half of the damages incurred by its cargo where both vessels are at fault, * * *" (Pet. Brf. 44).[7] These inaccurate assertions they are forced to make in order to invoke the policy of the Harter Act and the Carriage of Goods by Sea Act that carriers by sea "are not to be chargeable *by their cargo* with responsibility for acts of navigation" (Pet. Brf. 39).

---

[6] Actually the so-called "anomaly" is misstated. No more can accurately be said than that when the carrier is solely to blame he must pay for all the damages sustained by the non-carrier, and when both are to blame he is liable to the non-carrier only for a division of their respective damages. The fact that in the second case the non-carrier's damages will include the non-carrier's liability to the cargo is only incidental to the operation of the principles involved.

The decision of this Court in *Great Lakes Transit Corp.* v. *Interstate S. S. Co.*, 301 U. S. 646, cited petitioner's brief, page 44, makes no change in the principles laid down in the cases which we have cited. That case involved only equities between certain insurers and their carrier insured. The Harter Act was not involved since it had been waived by the carrier who was a named insured in the policy. The policy covered not only cargo but the carrier's legal liability as well.

[7] Compare similar statements, Brief for Respondent Belgian Overseas Transport, S. A., owner M. V. "Esso Belgium", p. 39.

They are immediately betrayed, however, when they say that the Both-to-Blame clause comes into play "only to the extent that the non-carrier is able to shift the burden of the cargo loss to the carrier" (Pet. Brf. 42). Obviously it is the non-carrier, not the cargo owner who "shifts the burden of the cargo loss to the carrier". The non-carrier is able to do this only because the claim which he enforces is for his own damages resulting from the collision to which the Acts have no application. Even though this results in a shifting of the "burden" of a part of the cargo loss to the carrier, the result is not inconsistent with any scheme of distribution of losses adopted by the Harter Act and the Carriage of Goods by Sea Act. On the contrary, it is entirely consistent with that scheme which dealt only with the liability of the carrier to the cargo owner and left the carrier's liability to any other vessel owner precisely as it had been. *The Chattahoochee, supra.*

The statement in petitioner's brief (p. 22) that the acts establish "a uniform statutory scheme under which the risk of cargo damage caused by errors and faults in navigation is to be borne by cargo rather than by carrier" is obviously true in a limited sense only. To the extent that this means that the carriers are no longer "to be chargeable by their cargo" (Pet. Brf. 39) for such damage, we can agree. But the acts clearly do not indicate any more than this. Clearly they do not give the carrier any immunity from his liability to another shipowner.[8] Equally clearly they do not put upon cargo any part of the risk of damage by faults and errors of navigation of another vessel, nor any part of the carrier's risk of liability to another vessel owner as the result of a collision, even though that

[8] In the Brief for Respondent Belgian Overseas Transport, S. A., at page 12, this "statutory scheme" is described as "The policy of total immunity [to the carrier] announced in both the Harter Act and the Carriage of Goods by Sea Act". Obviously no immunity was granted to the carrier with respect to his liability to another shipowner.

liability may include some transfer of the non-carrier's burden of liability to the cargo. To describe such transfer as an indirect liability for cargo damage does not help petitioner. It is not a liability *to the cargo owner*, and it is only with the vessel owner's liability to the cargo owner that the Acts deal.

The plain fact of the matter is quite contrary to that stated by petitioner's counsel. The cargo owner does not require the carrier to bear half of the damages incurred by its cargo. Neither does the cargo owner recover from the carrier "in effect", "indirectly", or otherwise. Cargo owners and their insurers have not sought or obtained any recovery from the carrier. They have sought and obtained a recovery from the non-carrier only. If the non-carrier vessel were lost or unsuable, or if the non-carrier and its surety should disappear from the picture today, the cargo interests could obtain no recovery. If the non-carrier were able to limit its liability to an amount less than the amount of the cargo damage the cargo interests could obtain no more, although they would be entitled to a preference in the distribution of the limitation fund. *The Geo. W. Roby*, 6 Cir., 111 Fed. 601, cert. den. 183 U. S. 699.

Actually in this very case the cargo interests are not even parties to the suit of the non-carrier against the carrier, except as the cargo owners have been impleaded therein by the carrier. There is no pleading in either case on which cargo owners or their insurers could possibly be awarded any recovery from the carrier.

It is perfectly clear that the cargo recovery will be paid by the non-carrier or not at all.

(e) *No division of damages between the vessel owners should be permitted to affect the cargo owner's right to a full recovery from the negligent non-carrier.*

The carrier's liability arises solely out of the operation of the principle of division of damages between negligent

shipowners existing in admiralty in collision cases. If that principle had not existed, or if it had been held inapplicable in the case of *The Chattahoochee, supra,* the cargo owner would not have been adversely affected, for no question was raised as to the right of the cargo owner to recover his damages in full from the negligent non-carrier under the decision in *The Atlas, supra.* The petitioner's argument in that case was that the non-carrier should bear the cargo loss in its entirety.[9]

Such a result was reached in a case recently before this Court, *Halcyon Lines* v. *Haenn Ship Ceiling Corp.*, Nos. 62 and 197, October Term, 1951, decided January 14, 1952. In that case the negligent non-employer was required to bear the entire damage suffered by an innocent workman, without benefit of contribution from the more negligent employer who was protected from liability for negligence by the Longshoremen's and Harbor Workers' Compensation Act, it being held that no right of contribution existed. So but for the rule of division of damages between shipowners would the owner of the "Esso Belgium" have been required to bear the entire loss of the innocent cargo owners here.

The action of the non-carrier in seeking a recovery from the carrier is beyond the control of the cargo owners. They are not chargeable therewith nor should they be deprived of any rights thereby. The rule of equal division of damages between negligent vessel owners was adopted to do justice between them, and this Court in *The Atlas, supra,* 93 U. S. 302, 318, said that in adopting this rule it did not intend to adopt a rule which would deprive innocent parties of full compensation nor could it ever sanction such a result. To deprive the cargo owner of the

---

[9] The argument ran—"while in this case it works an apparent hardship upon the steamer, (a hardship more apparent than real, owing to the greater fault of the steamer,) it does not in reality extend her liability, but merely prevents her taking advantage of a deduction to which without the act she might have been entitled". (See page 552.)

full recovery to which he is entitled from the negligent non-carrier because a division of damages is allowed between the vessel owners would be to do just that.

Actually the shipowner's complaint of an anomaly is based only on an interference of the special privileges which have been accorded to him. The admiralty rule of division of damages between negligent vessel owners was adopted in his interest as producing a fairer and more equitable disposition of burdens between shipowners than the harsh rule of the common law requiring a negligent shipowner to bear the entire burden of his damages sustained as the result of a collision without redress against another shipowner whose negligence also contributed. While this rule may increase his burden in a given case (as for the "Nathaniel Bacon" here), it will reduce his burden in another (as for the "Esso Belgium"). In the next case the positions may be reversed.

There have been learned discussions on the subject of whether a rule permitting a negligent person who has been held liable for the entire damage of an innocent sufferer to compel another person whose negligence has contributed to share his burden is desirable or in the public interest.[10] But there has been no suggestion that the innocent sufferer should be compelled to bear the consequences.

The shipowner's release from the direct claims of shippers for negligent damage to goods in his care, bestowed upon the common carrier of goods by sea by the Harter Act and the Carriage of Goods by Sea Act, is a special privilege not granted to other common carriers (a legal "anomaly" in itself).

The shipowner's complaint is based on the proposition that the operation of the equitable rule of division of damages adopted in his general interest as being more fair and equitable has the practical effect in some cases

---

[10] *See*: James, Contribution Among Tort-Feasors, A Pragmatic Criticism, 54 Harv. L. Rev. 1156; Gregory, Contribution Among Tort-Feasors, A Defense, 54 Harv. L. Rev. 1170.

of depriving him of a portion of the benefit of his special privilege of release from direct claims of shippers. He therefore conceives that he should be able to extend his special privilege beyond anything given him by the statutes and for his own benefit to deprive the innocent cargo owner of a portion of the proceeds of the cargo owner's rights under the rule of *The Atlas*, something that certainly was not done or contemplated by the Harter Act.

In this connection the observation of Senator Schwellenbach at the hearings on the Brussels Collision Convention, 1910, is pertinent. He said:

> "I appreciate that to be the effect of the convention, but I do not see how the shipowners were in a position to complain about an anomalous situation when it was their own effort to get protection against liability to cargo owners that started the matter."[11]

What would be anomalous would be if the unquestioned rights of innocent cargo owners to recover (and retain) full damages from a negligent non-carrier were held to be subject to confiscation of half the amount thereof by the carrier by virtue of the carrier's own negligence.[12]

The obvious remedy for the shipowner's position would be to abolish or limit the operation of the division of damages rule. That would harm no innocent person. But that would require legislation and would not please the shipowners. Consequently, they reason that the innocent

---

[11] See Report of Hearings on Brussels Collision Convention, 1910, before a Subcommittee of the Committee on Foreign Relations, United States Senate, 75th Congress, 2d Session, January 10-14, 1938, p. 408.

The alleged anomaly resulting from the decision in *The Chattahoochee* was being urged by the shipowners as a reason for ratification of the Convention which would have adopted the rule of liability for property damage proportionate to degree of fault thereby reducing cargo's right of recovery against the non-carrier in a both to blame case. Ratification was successfully opposed by cargo interests and others, including seamen, whose property claims would have been affected.

[12] See, Stanford Law Review, February 1952, Vol. 4, No. 2, pp. 286, 288.

cargo owners are legitimate prey and may be vulnerable to a clause forcing an additional burden upon them. We submit that the cargo owners are entitled to protection from such an imposition.

Actually, if the Both-to-Blame clause is upheld, its effect will be to destroy that very equal division of the damages between negligent shipowners which it is the object of the division of damages rule to achieve, and which has heretofore been considered just. If the carrier is to be given "immunity" from liability for a part of the division of damages, and the burden transferred to the innocent cargo owner, it is obvious that the carrier will bear a lesser burden of the damages than the non-carrier, and the rule of equal division which is the source of the carrier's liability will have failed to achieve its purpose.

(f) *The Both-to-Blame clause is of necessity an indemnity, not an immunity, clause.*

Petitioner's counsel use the term "immunity" much too loosely. When they say that the acts "make ocean carriers immune from liability to their cargo" (Pet. Brf. 6) and that the carrier is, therefore, entitled to enjoy "relief from responsibility to its cargo" (Pet. Brf. 7) we can agree. But when they say that the effect of the Both-to-Blame clause is only to give the carrier the same "immunity in a mutual fault situation as it has by statute where it is solely at fault" (Pet. Brf. 14, cf. 7), we must observe not only that the statement is incorrect, but that they have given away their argument.

What the clause demands is not immunity but indemnity, and necessarily so. Obviously it is beyond the power of the cargo owner to give the carrier immunity since the claim asserted against the carrier is not the cargo owner's claim but the non-carrier's. Petitioner's counsel clearly recognize this when they explain that the Both-to-Blame clause does not affect the carrier's liability to the non-carrier for the latter's "collision damages"

(Pet. Brf. 42) consisting of "the amount it had paid as damages to the cargo of the carrying vessel" (Pet. Brf. 41). They also concede that the clause is necessarily cast in the form of an indemnity because of the nature of this liability (Pet. Brf. 25).

What the clause demands of cargo is not immunity, which the cargo can not give, but an indemnity to the carrier against his liability to another shipowner for collision damages resulting from his negligence toward that other shipowner. See *American Mut. L. Ins. Co.* v. *Matthews*, 2 Cir., 182 F. 2d 322, 324.

(g) *The demand of the carrier on the cargo owners for an indemnity against the carrier's tort liability to another, is unreasonable.*

It is axiomatic that to be sustained the Both-to-Blame clause must be both just and reasonable.

Express Co. v. *Caldwell*, 21 Wall. 264, 266-8;
Liverpool Steam Co. v. *Phenix Ins. Co.*, 129 U. S. 397, 441;
Railroad Co. v. *Pratt*, 22 Wall. 123, 134;
The Kensington, 183 U. S. 263, 268;
Ansaldo San Georgio I v. *Rheinstrom Co.*, 294 U. S. 494, 498-9.

The bare statement that the indemnity sought is against the vessel owner's tort liability to another vessel owner should sufficiently, we submit, demonstrate its unreasonableness. To give a carrier a release from the direct claims of shippers, as the Acts have done, is drastic, but to require that the cargo owner shoulder the burden of the shipowner's tort liability to another vessel owner is, we submit, without precedent and beyond all reason.

The effect of the clause would be to make the innocent cargo owner responsible for the negligent acts of the shipowner's servants towards the other vessel owner.

Those servants are not agents of the cargo owner or subject to his control. *The Atlas*, 93 U. S. 302, 311.

It is clearly not sufficient for petitioner to say that the Both-to-Blame clause operates only in situations when the Acts relieve the carrier from liability to its cargo (Pet. Brf. 35) or that it does not constitute a contracting out of any of the redefined essential duties of the carrier to the cargo (Pet. Brf. 32). Surely it is not true that any clause is valid provided only that the essential duties owed by the carrier to the cargo owner are not reduced by the contract.[13] If that were true the carrier could demand of the cargo a complete indemnity against his entire liability to the non-carrier, or even against any physical damage to his own ship or other loss arising from a collision, under the same circumstances.

Petitioner's counsel criticizes the Court of Appeals for relying on decisions denying validity to clauses relieving the carrier from liability for negligence (Pet. Brf. 9, 31) in illustration of the proposition that the cases show that the courts have not been at all disposed to reduce the common carrier responsibility of the shipowner (R. 140, 141). The fact of the matter is that heretofore the unreasonable clauses proposed by carriers have been limited to clauses designed to permit them to escape liability to the cargo owners for damage resulting from their negligence. Never before, so far as we are aware, have shipowners gone so far as to demand from their cargo an indemnity for the shipowner's own loss or liability resulting from the shipowner's negligence. It would seem clear to us that when clauses tending to release the carrier from liability for negligent injury to cargo otherwise than as specifically permitted by statute have been uniformly held void as unreasonable, *a fortiori* should any clause demanding from the cargo owner indemnity for loss or liability sustained by the

[13] The argument in the Brief for Respondent Belgian Overseas Transport, S. A. is based chiefly on this ground, see pp. 5, 6, 7; 15, 16, 22. See comment, *infra*, pp. 45-49.

carrier himself as a result of the carrier's own negligence be held invalid. The Acts do not indicate otherwise.

(h) *The Jason clause is not an indemnity clause.*

The *Jason* clause (Pet. Brf. 36) is not an indemnity clause. It does not contain the word indemnity. It is a clause which brings into play the principles of equity and reciprocity upon which the entire law of general average is founded. *The Jason*, 225 U. S. 32, 57. The clause deals only with general average. To represent the *Jason* clause as an indemnity clause is to misrepresent the principles of general average with which it deals.[14]

The *Jason* clause provides only that the shipowner and the cargo owner shall both contribute in general average that is, to those sacrifices and expenses incurred by the *voluntary* act of the Master, *after* a disaster, *as the common agent of both*, to save all interests from a greater loss. *Ralli* v. *Troop*, 157 U. S. 386, 397-401. No interest is indemnified. Even sacrificed interests contribute on the amount of the sacrifices allowed so that they will be no better off than if another interest had been chosen for sacrifice. Congdon on General Average, 2nd Ed. 167. Each interest contributes only pro rata according to its benefits received, that is, on the value of the interest saved. The clause is reciprocal and gives equal rights to both.

The *Jason* clause produced a desirable result. But for this clause the Master as the sole agent of the shipowner could have sacrificed cargo to save the ship with impunity under the protection of the Harter Act. *The Jason*, 2 Cir., 178 Fed. 414, 417.

The *Jason* clause merely enables cargo to have the Master as its agent at the time and place of peril to make such sacrifices as may be timely and most effective

[14] In the Brief for Respondent Belgian Overseas Transport, S. A. the *Jason* clause is consistently represented as an indemnity clause, see pp. 8, 10, 19.

to avoid a greater loss. It operates only in a situation where the cargo owner has already suffered a loss which may prove to be total through the negligence of the carrier for which the cargo owner has no redresss. It puts cargo in a better position by restoring the Master to a position of impartial agency for all interests to minimize that loss. And to secure that right cargo agrees to contribute to those sacrifices in general average. *The Toluma*, 2 Cir., 72 F. 2d 690, 693, affirmed *sub nomine Aktieselskabet Cuzco* v. *The Sucarseco*, 294 U. S. 394, see pp. 402-3.[15]

By contrast the Both-to-Blame clause would definitely result only in prejudice to the rights of cargo. Rights under it are not reciprocal. It is based on no doctrine of recognized equity and justice and it in fact places the cargo owner in a worse position because of the negligence of the carrier. Stanford Law Review, February 1952, Vol. 4, pp. 286, 288.

Although the Both-to-Blame clause has been patterned upon the *Jason* clause in an attempt to obtain plausibility, the Court of Appeals found the analogy not persuasively close (R. 147) and, we submit, the court was right.

Granted that the decision in the case of *The Jason* stands for the proposition that since the Harter and Carriage of Goods by Sea Acts, it is now competent for carriers to contract in a manner which would not have been permitted before the enactment of those Acts consistent with the policy found expressed in those Acts (Pet. Brf. 34), it is still necessary for petitioner's counsel to find a policy expressed in those Acts which would justify the Both-to-Blame clause.

---

[15] The Carriage of Goods by Sea Act contains a provision expressly intended to preserve the validity of the Jason Clause. Section 5, last sentence, 46 U. S. C. 1305. The Hague Rules, when framed, were considered to have no effect on General Average, see discussion London conference, Bulletin No. 57, International Maritime Committee, London Conference, October 11, 1922, pp. 476-479.

(i) *There is no policy indicated in the Harter Act which supports the Both-to-Blame clause.*

The sole object of the Harter Act was to modify the direct liability previously existing between the vessel and its cargo. *The Delaware,* 161 U. S. 459, 474; *The Chattahoochee,* 173 U. S. 540, 554-5.

It is quite true that the Harter Act was promoted in response to demands from shippers (Pet. Brf. 14-15). The demand was for relief from unreasonable clauses restricting the liability of the carriers. *The Delaware, supra,* pp. 471-474. As discussed and passed in the House, the Bill had only this effect. In presenting the Bill to the House for passage, Mr. Lind explained that the Bill went "only to the extent of providing that these companies shall not exact such bills of lading; further than that the Bill does not go" (24 Cong. Rec. 148). The House Report on the Bill is extended in the record and comments only on the onerous clauses against which the Bill was directed, with examples.

The passage of the Bill in the House was accompanied only by similar comments (24 Cong. Rec. 171-173).

This was the extent of the promotion of the Bill by cargo interests.

The Bill was drastically amended in the Senate at the behest of the shipowners, and Section 3 placed in its present form to give a carrier, who had exercised due diligence to make his ship in all respects seaworthy, an exemption from liability to the cargo owner for cargo damage resulting from faults and errors in navigation.

The very fact that cargo interests who were represented at the hearing apparently acquiesced in the enactment of Section 3 in its revised form should be the basis for restricting the scope of the Act to the precise effect of the language chosen. Certainly those cargo interests who were represented had no thought of giving up any part of their rights against a negligent non-carrier.

What the carrier did not even ask for in the "legislative halls", he should not be granted now in the form of a contract forced on the cargo owner for the purpose of filling an alleged gap (R. 137). We submit that the criticism of the Court of Appeals for treating Section 3 of the Harter Act as "remedial legislation" which the courts should be reluctant to extend (Pet. Brf. 9) is quite without foundation.

Being in derogation of the common law liability, Section 3 of the Harter Act has uniformly been construed strictly and literally. *The Carib Prince*, 170 U. S. 655, 661-2; *The Irrawaddy*, 171 U. S. 187, 195-6; *The Wildcroft*, 201 U. S. 378, 388-9; *May* v. *Hamburg &c.*, 290 U. S. 333, 351.

At the time of enactment of the Harter Act the rule of equal division of damages between vessel owners had long since been established. *The Catherine* (1854), 17 How. 169. There is no indication that this rule was then considered to be affected. On the contrary, in view of the well-settled nature of the general rule at the time, it must result that legislative approval was by clear implication given to the general rule since it was not changed. *The Kensington*, 183 U. S. 263, 268-9; *The Geo. W. Roby*, 6 Cir., 111 Fed. 601, 614-621, cert. den. 183 U. S. 699.

Contemporary comment does not indicate that the shipowners felt outraged by the decision in the case of *The Chattahoochee*. On the contrary, in 1899, in an address before the International Law Association on the subject of the Harter Act, following the decision in *The Chattahoochee*, Everett P. Wheeler, eminent shipowner's counsel of New York, extolled the benefits to shipowners of the Harter Act and, in summarizing its effects, set forth the result of the decision in *The Chattahoochee* without comment. Report of 18th Conference, The International Law Association, pp. 178-200. His view of the effect of the decision in *The Chattahoochee* was only that—"The limitation of liability given by the act to the carrier does not increase the liability of the other tort feasor" (p. 196).

He also pointed out that "Any extension of the Harter Act must be sought from legislation and not from the courts" (p. 194).

In the case of *American Mut. Liability Ins. Co.* v. *Matthews*, 2 Cir., 182 F. 2d 322, 326, Learned Hand, *C. J.*, analyzed the purposes and results of the Harter Act. He pointed out that in the balancing of relief and burden to the shipowner in the Act, the compensating burden placed on the shipowner was very slight while the relief from liability to the cargo owner for damage resulting from negligence was substantial. Consequently, it was his conclusion that the effect of the doctrine of *The Chattahoochee* is that the sum of the changes in the owner's duties was not enough to justify extending the release beyond the direct claims of shippers.

Since the decision in the case of *The Chattahoochee*, the results of that decision have been generally supposed by distinguished experts to be included in the policy of the United States as represented in the Harter Act (R. 145, fn. 8). In 1938, Charles C. Burlingham, Esq., eminent shipowner's counsel, voiced this view when testifying before a Senate Committee in support of the Brussels Collision Convention, 1910, which would have modified the rights of cargo owners by reducing the liability of the non-carrier to liability proportionate to degree of fault. He said:

> "In the second place, if Mr. Englar asked me the question he asked Mr. Sayre, I might well have conceded that the policy of the United States is shown not only in the Harter Act, but in the interpretations of the Harter Act, and I suppose that the 'Chattahoochee' is a part of the policy of the United States at this moment, until it is changed." Report of Hearings on Brussels Collision Convention, 1910, before a Subcommittee of the Committee on Foreign Relations, U. S. Senate, 75th Congress, 3d Session, January 10-14, 1938, p. 72.

In his letter of instructions to the delegates appointed to represent the United States at the conference which

framed the Brussels Collision Convention, 1910, the Assistant Secretary of Commerce stated that the principle of liability of the non-carrier only proportionate to degree of fault was "at variance with the Harter Act of February 13, 1893, which, as construed by the Supreme Court, relieves the carrying ship from liability for damages to cargo in such cases, but allows the non-carrying ship to recover contribution from the carrier". The delegates were instructed to "procure the insertion in the protocol of an explicit reservation on the subject on behalf of the United States" which would preserve the effect of the Harter Act as thus construed, "which must be regarded as defining the settled policy of the United States respecting both the relief of carrying ships from direct responsibility and their indirect responsibility for injury to cargo". Report of Hearings on Brussels Convention, 1910, Before a Subcommittee of the Committee on Foreign Relations, United States Senate, 75th Cong., 2d Sess., January, 1938, p. 14.

The delegates failed to carry out their instructions and the Convention was therefore found unacceptable in this country and has not been ratified (see *infra*, pp. 37, 46).

We submit that the Court of Appeals was right. The American policy as embodied in the Harter Act is clear and it is against the Both-to-Blame clause (R. 145).

(j) *The Carriage of Goods by Sea Act goes no further.*

It can hardly be suggested that the Carriage of Goods by Sea Act goes further, or has any broader effect in any manner here pertinent than did the Harter Act. The single significant additional advantage to the carrier was the elimination of the condition of the exercise of due diligence to make his vessel in all respects seaworthy on which his release from direct liability to the cargo owner in the Harter Act depended, although the duty to exercise due diligence to make his ship seaworthy was continued (Sec. 3. (1), 46 U. S. C. 1303).

On the other hand, substantial additional benefits were granted to the cargo owner in the form of protection from certain onerous clauses customarily exacted by shipowners (see Pet. Brf. 21, fn. 11). The support of the cargo interests for the Bill was enlisted and obtained because of these definite benefits and because of the fact that it was considered that certainty of the respective rights and obligations of carrier and cargo owner would result.

The Both-to-Blame clause was first promulgated in 1935 only a few months before the bill came before Congress for consideration. However, the cargo interests who supported the bill were satisfied not only that the Both-to-Blame clause would be as invalid and unenforceable under the proposed Act as under the Harter Act, but also that the Both-to-Blame clause would be specifically prohibited by Section 4(3) of the proposed bill (see *infra*, p. 39). Nevertheless one of the cargo interests represented at the hearings on the proposed bill considered that it would be desirable to add to the bill a specific prohibition which would in terms outlaw the recently introduced Both-to-Blame clause in order that extended litigation over the validity of that clause might be forestalled and prevented. Mr. Englar, representing the American Institute of Marine Underwriters, therefore, appeared before the Senate Committee and read a prepared statement from which the following are excerpts:

> "A careful study of the above bill has satisfied the institute that the clause above quoted is prohibited by section 4 (3) of the bill, which reads as follows:
>
> 'The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.'
>
> The institute, therefore, supports the bill, but suggests that section 4 (3) be amended to read as follows:
>
> The shipper *or owner of the goods* shall not be responsible for loss or damage sustained, or *liability therefor incurred*, by the carrier or the ship arising

or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants. *Any clause or stipulation which seeks to impose liability contrary to the foregoing shall be null and void, including any clause or stipulation requiring the owner or cargo to indemnify the ship or carrier against liability to a colliding vessel for any part of the collision damages paid or payable by such colliding vessel.* (New matter italicized.)

* * * *

Under these circumstances it will naturally be argued that, if the statute in its present form is clear, no amendment is necessary. Our answer to this argument is that the objectionable clause has only recently been introduced, and it must be anticipated that the carriers will make a determined effort to sustain it. Its validity will undoubtedly be the subject of protracted litigation. The purpose of the rules is to avoid such litigation, and if the objectionable clause had been introduced at the time the Hague rules were formulated, it would undoubtedly have been prohibited by express reference. This was done in the case of a far less objectionable clause, *i. e.*, 'The benefit-of-insurance clause,' which is specifically referred to in section 3 (8).

The institute, therefore, urges the amendment of 4 (3) above quoted, and, if this amendment is not adopted, the Institute desires specifically to reserve the privilege of urging appropriate legislation dealing expressly with the objectionable 'Both-to-Blame collision' clause." (Hearings Before Committee on Commerce, U. S. Senate, 74th Cong., 1st Sess. on S. 1152, pp. 53, 54.)

In petitioner's brief, page 29, Mr. Englar is quoted as saying that "The rules in their present form, and that the Bill 1152 in its present form, does not invalidate this objectionable clause". The omission of the word "specifically" before "invalidate" was obviously either inadvertent or a reporter's error. Immediately following the reported statement, Mr. Englar said—"Therefore, as long as this clause has come up, my suggestion here is that we deal with it *specifically*; but if that will be the final straw

which prevents the adoption of the law, I will waive it." The quotation in petitioner's brief from Mr. Englar's testimony is an obvious misrepresentation of the position of Mr. Englar and his clients.

Other cargo interests represented at the hearing thought that Mr. Englar's proposal was unnecessary and that since it was objected to by the carrier interests it should not be pressed since this might jeopardize the passage of the bill which, in its other provisions, gave the cargo owners much needed relief. Speaking for these interests, Mr. Walter said:

> "A clause has been recently incorporated in some bills of lading, to which Mr. Englar referred, which does violate provision 3 of the section referred to, and therefore could not be enforced, because the very enacting clause—lines 3 to 6 at the beginning of the act—say:
>
> That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this act" (Hearings, *supra*, p. 59).

In view of the misleading quotation of Mr. Englar's testimony by petitioner's counsel we print as an appendix to this brief the section of the Report of Hearings covering the above transactions (see *infra*, pp. 64-77).

Mr. Englar's statement was also read before the House Committee by W. J. Nunnally, Jr.,[16] appearing for Mr. Englar, who was ill, and the proceedings there were similar. Hearings before Committee on Merchant Marine and Fisheries, House of Representatives, 74th Cong., 2d Sess., on S. 1152, January 26, 1936.

As noted in petitioner's brief (pp. 27-28), Mr. Keating, representing the American Steamship Owners Association,

---

[16] The quotation from the Virginia Law Review, Brief for Respondent, Belgian Overseas Transport, S. A., p. 29, fn. 12, suggesting that Mr. Nunnally agreed that §4(3) does not affect the legality of the Both-to-Blame clause is quite erroneous. The other statements referred to were by shipowners' representatives.

and Mr. Haight, who appeared before a later Committee as the paid representative of foreign steamship owners' P. & I. underwriters (see *infra*, pp. 48-49), objected strenuously to the inclusion of Mr. Englar's proposed amendment. In order to avoid jeopardizing the bill, and since the clause was believed to be forbidden in the bill as it stood, the amendment was, therefore, not pressed, and there is no indication that it was seriously considered by either the Senate or the House Committees. Under these circumstances, we submit that any deduction from the fact that Mr. Englar's proposal was not adopted that Congress inferentially approved the Both-to-Blame clause is wholly unwarranted.

(k) *The Both-to-Blame clause violates the stated purposes of the Carriage of Goods by Sea Act.*

In its Report No. 2218 on S. 1152, the House Committee stated the purposes of the Act as follows:

> "The purpose of this bill is to define by law the rights and liabilities of water carriers and shippers in foreign commerce" (p. 1).
>
> "The uniformity and simplification of bills of lading will be of immense value to shippers who will be relieved of the necessity of closely examining all bills of lading to determine the exceptions contained therein to ascertain their rights and responsibilities; to underwriters who insure the cargo and are met with the same difficulties; and to bankers who extend credit upon the bills of lading" (p. 7).

In the Senate Report, No. 742, on the same bill it was stated:

> "It also will accomplish real uniformity and agreement with many other nations as to the text of those clauses of ocean bills of lading with which the bill deals" (p. 4).

Concededly, the Both-to-Blame clause is a purely American clause, of importance only in this country. If the clause is held valid, cargo owners, principally American, who of necessity must litigate for collision recoveries in this country, will be subject to the burden of an indemnity clause known nowhere else.

Their position will be much worse than, for instance, under the law of England or under the Brussels Collision Convention. Under such law, the cargo owner's recovery is indeed limited to a proportion of his damages equal to the non-carrier's degree of fault. This the cargo owner knows, and that is the end of the matter.

In this country, on the other hand, the cargo owner is left subject to a potential and uncertain liability which may hang over his head for many years. For instance, in this case 10 years after the collision, the cargo owners, some of whom have not been served with process under the impleading petition, are still subject to suit in New York or elsewhere on the carrier's claim.[17] Obviously the enforcement of the Both-to-Blame clause will lead to great uncertainty and confusion in collision cases, especially when complicated by proceedings for limitation of liability under the Limited Liability Act (R. S. §4281, *et seq.* as amended, 46 U. S. C. 181 *et seq.*) (see R. 138 and fn. 2).

If the Both-to-Blame clause is a valid clause, no longer can a shipper, a banker, or an insurer rely on the definition of the cargo owner's rights and responsibilities in the Act. Here is an onerous responsibility forced on the cargo owner quite outside the Act. The certainty and uniformity of rights and responsibilities sought by the Act is therefore destroyed.

---

[17] In the case of *Erie R. R. Co.* v. *Erie Trans. Co.* (1907), 204 U. S. 220, the collision had occurred on October 21, 1891. The cargo owners had collected their damages from the non-carrier as the result of the decision in the *New York*, 175 U. S. 187. If there had been a Both-to-Blame clause in that case, the cargo owner would have been subject to the carrier's suit for indemnity more than 16 years after the collision, and long after they had collected their damages from the non-carrier.

There are, however, further indications of the policy of the Carriage of Goods by Sea Act. Section 5 (46 U. S. C. 1305) by expressly giving permission to the carrier to surrender or lessen his rights under the Act "impliedly excludes permission to the carrier to increase his rights". Temperley's Carriage of Goods by Sea Act, 4th Ed., p. 64. And Section 4(3) expressly provides that the shipper shall not be responsible for loss or damage sustained by the carrier resulting from any cause without the neglect of the shipper (see *infra*, p. 39 *et seq.*). Moreover, Section 6 (46 U. S. C. 1306) permits voluntary agreements with respect to particular goods only provided they are placed in a non-negotiable receipt and are not incorporated in negotiable bills of lading, and provided also that "the character or condition of the property" and the special "conditions under which the carriage is to be performed are such as reasonably to justify a special agreement". The Both-to-Blame clause cannot qualify under this provision since it is contained in the bills of lading. It, therefore, cannot be justified as a "special agreement".

Furthermore, the Act in the final sentence of Section 3(8) (46 U. S. C. 1303) specifically voided a far less objectionable clause, *i. e.*, the benefit of insurance clause, and it consequently seems quite clear to us that if the Both-to-Blame clause had been in use at the time the Hague Rules were formulated, that clause also would undoubtedly have been prohibited by express reference (see comment by Mr. Englar, *supra*, p. 31).[18]

---

[18] §3(8) not only forbids "any benefit of insurance clause" but also any "similar" clause. The Both-to-Blame clause is an attempt by carriers to secure the benefit of the cargo owner's insurance by indirection, on the unwarranted assumption that all cargo is insured (see R. 140, fn. 4). The cargo owner is himself required to stand as insurer of the carrier and can protect himself against the liability sought to be imposed only by insurance. The Both-to-Blame clause is, therefore, a forbidden compulsory insurance clause. *Inman* v. *So. Car. Rwy. Co.*, 129 U. S. 128, 139. The carrier cannot obtain by indirection that for which he may not stipulate directly. *The Turret Crown*, 2 Cir., 297 Fed. 766, 778, cert. den. 264 U. S. 591. The Both-to-Blame clause is a benefit of insurance or similar clause and, therefore, forbidden.

The Both-to-Blame clause is, we submit, entirely contrary to the purposes and the fundamental policy, as well as the specific provisions, of the Carriage of Goods by Sea Act.

(1) *The Both-to-Blame clause is an attempt by shipowners to secure the distribution of cargo losses accomplished in certain foreign countries by the Brussels Collision Convention, 1910, on principles rejected here, rather than in accord with any principle adopted by the Acts. Any such change is for Congress, not the shipowners, to make.*

The purpose, and proposed effect, of the Both-to-Blame clause is concededly to limit the net recovery of the innocent cargo owner from the non-carrier to fifty percent of his damages in cases where both vessel owners are to blame. Conceding his right to a full recovery, the shipowner would allow him to retain "only that portion of the damages for which the non-carrier is ultimately responsible" (Pet. Brf. 14). This is the equivalent of liability of the non-carrier only proportionate to the non-carrier's degree of fault.

In England the so-called moiety rule limiting the recovery of the cargo owner against a non-carrier to a moiety, when both vessel owners were at fault, was established in the admiralty courts in *The Milan* (1861), Lush Adm. 388. The common law rule allowed a full recovery but the admiralty rule became the general rule in England as a result of the Judicature Act of 1873 which made the rules then enforced by the admiralty courts the law of England in all courts in maritime cases.[19]

---

[19] Even in England the moiety rule established by *The Milan* has been severely criticized by English Judges and textwriters, as being "unjust", "unsound", and "not based on any principle whatever", and further as probably arising from a misinterpretation of the earlier decisions, as pointed out in the opinion of

[Footnote continued on following page.]

The principle of *The Milan* was strongly urged upon this Court, carefully considered, and rejected in *The Atlas, supra* (1876), 93 U. S. 302, 314-317. The principle of *The Milan* was incorporated in the Brussels Collision Convention, 1910, with a further provision permitting the courts to divide liability in other proportions than 50-50. The Convention was embodied in the English Maritime Conventions Act, 1911, and ratified by a number of other foreign countries. That Convention has been consistently opposed in this country and has failed of adoption.

In the Court below shipowner's counsel frankly stated that the purpose of the clause was to secure a somewhat similar distribution of the cargo loss to that which is accomplished elsewhere by the Collision Convention (R. 139, and see Pet. Brf. 11 and fn. 4). This is again stated in the Brief for Respondent Belgian Overseas Transport, S. A., filed in this Court, page 25. It is true as stated in this same brief that the Convention was opposed on behalf of passengers, crews, and labor unions whose property rights as innocent sufferers would have been restricted in the same manner as those of equally innocent cargo owners, a circumstance which surely indicates the undesirability of the application of the principle of the Convention to any innocent person.

Probably the most effective, though not basic, argument against the ratification of the Convention was that

---

[Footnote continued from preceding page.]

this Court in *The Atlas, supra,* 93 U. S. 302, pp. 314-315. For instance, in Marsden on Marine Collisions, 9th Ed. 1934, p. 136, the English rule is criticized as "working positive injustice" in that "it prevented the innocent owner of cargo on either ship from recovering from the wrongdoing owner of either ship more than a part of his loss"; and in Roscoe on Damages in Marine Collisions, 3rd Ed., pp. 20, 21, the rule is criticized as being "not logically satisfactory" and "historically unsound". And see *The Drumlanrig* (1910), Prob. 249, at p. 262 and p. 269; and *Stoomvaart etc. v. P. & O. Navigation Co.* (1882), 7 App. Cas. 795, 819. In the cases cited the moiety rule, while criticized, was held not open for further discussion in the English courts in view of the provision of the Judicature Act.

interposed by the representatives of the American Steamship Owners Association and other commercial interests, that no such fundamental change should be made in our "basic American law with respect to collisions" except "in the usual way by an Act passed by both Houses of Congress" (Brief for Respondent Belgian Overseas Transport, S. A., p. 26, fn. 10).[20]

Similarly, no such fundamental change in our basic law of liability for collision damage as that demanded by the shipowners through the medium of the Both-to-Blame clause should be permitted through the unilateral action of the shipowners amounting in itself to legislation.

Surely this is a situation in which many groups of persons with varying interests are vitally concerned with the administration of the acts relating to shipowners' liability as an integrated whole, as to which only legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. *Halcyon Lines* v. *Haenn Ship Ceiling Corp.*, Nos. 62 and 197, October Term, 1951, decided Jan. 14, 1952.

If long settled principles of our law are to be overturned, the change should be made by competent legislative authority, and not left to the control and choice of the one group which is seeking to avoid the burden (R. 140, fn. 4).

We submit that the Both-to-Blame clause is not supported by any policy indicated by the Harter Act or the Carriage of Goods by Sea Act. On the contrary, the Both-to-Blame clause is contrary to public policy as expressed in these Acts (R. 145).

---

[20] Harvard Law Review, December 1951, Vol. 65, pp. 340-341.

III.

The Both-to-Blame clause is contrary to the specific provisions of Section 4(3) of the Carriage of Goods by Sea Act and is therefore unenforceable.

Section 4(3) of the Carriage of Goods by Sea Act, 46 U. S. C. 1304, reads:

> "(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants."

This broad prohibition is the capstone of the structure of the Act, the purpose of which we have shown, *supra*, p. 33, was "to define by law the rights and liabilities of water carriers" and to make it unnecessary for shippers, bankers and underwriters, to scrutinize bill of lading clauses or to go beyond the terms of the Act itself.

The very purpose of this provision as placed in the Hague Rules, 1922, and from there transferred to the Convention, and to the Act, was precisely to forestall the well understood ingenuity of carriers in drafting and inserting in bills of lading oppressive clauses. The Both-to-Blame clause was, of course, unknown when the Rules were drafted, and what future clauses might appear could not be anticipated. But the prohibition was inserted to make it absolutely certain that no clause to be devised could place any liability whatever on the shipper without his fault. The language, we submit, was well chosen for the effect intended.

As noted in Petitioner's Brief (p. 19) the Carriage of Goods by Sea Act was an enactment of the so-called Hague Rules first drafted at a meeting of the International Law Association at the Hague, August, 1921. That draft, intended only for voluntary use by steamship owners, proved

entirely inadequate. Consequently the rules were completely recast at a meeting of the International Maritime Committee at London, on October 9th-11th, 1922. This is the draft which with minor changes became the Brussels Convention, 1924, and with further modifications not here material was enacted as the Carriage of Goods by Sea Act.

At the London conference Section 4(3) was first introduced in a much more limited form. In the course of consideration it was redrafted and placed in its present all embracing form. The amendment was adopted without opposition after the following statement by the Chairman of the Conference:

> "The Chairman.—My own impression about it is that the words framed here have been designed to give the shipper the largest protection that could be devised for him. I may be wrong about it, but I must take the judgment of the Conference upon the subject. Is it the sense of the Conference that the words which have been read be inserted in the clause? (Agreed)." International Maritime Committee, Bulletin No. 57, London Conference, 1922, p. 480.

The Chairman's statement was not challenged from any quarter, and it was on the basis of this statement that the clause as amended was unanimously adopted as the recommendation of that Conference. No other, better, or different statement as to the purposes of the amended clause was made at the London Conference, at the Diplomatic Conference, or in the halls of Congress while the Act was under consideration.

It follows that if the provisions of Section 4(3) are not broad enough to nullify the Both-to-Blame clause, it is only because human language is inadequate to produce that result.

We have shown, *supra*, pages 30-33, that there is no inference favorable to the Both-to-Blame clause to be drawn from the fact that the Englar proposal for a precautionary amendment specifically outlawing the clause was not adopted. On the contrary, it is clear that cargo

interests supported the bill without that amendment because it appeared clear to them that the provisions of Section 4(3) of the bill as drawn were adequate to prevent the enforcement of the clause. It has never been necessary for them to act on their reservation of the right to apply further for specific relief from the clause because they have not been shown to have been wrong. The clause has never been enforced by any court.

There is no reason we submit for taking §4(3) at less than its face value or giving it a narrower construction than its framers intended.

Only two reasons are given in the text of petitioner's brief why this clause is not applicable.

At page 25 it is said that the Both-to-Blame clause is concerned with responsibility for loss or damage sustained by cargo rather than the carrier or the ship. On the contrary, the clause requires the cargo to indemnify the carrier against the carrier's "loss or liability to the other or non-carrying ship or owner". There can be no question that it is the carrier's loss by reason of his liability which is the subject matter of the clause (see Pet. Brf., p. 13, fn. 5).

At page 26 it is said that §4(3) cannot conceivably have been directed at this clause because it was drafted in 1922 long before the clause came into use. It was precisely because the clause was intended to apply to any future clause contravening its provisions, as well as to clauses which were then known, that the section was couched in such sweeping and all inclusive terms. Actually the Both-to-Blame clause was known when the Act was adopted, and the Act was agreed to by the cargo interests in the confidence that Section 4(3) did apply to the clause.

At page 26, in footnote 15, the further argument is made, however, that Section 4(3) was intended only to protect the shipper from any liability "which might be imposed under national law, beyond that imposed by Section 4(6)". Section 4(6) expressly recognizes and continues in effect the common law liability of a shipper for damage resulting

from the shipment of dangerous goods without the knowledge of the shipowner. Such liability is irrespective of knowledge of the cargo owner and therefore corresponds precisely with the common law warranty of the shipper as set forth in the cases cited. See Temperley's Carriage of Goods by Sea Act, 4th Ed., pp. 66-67.

Any liability of the shipper beyond that of warrantor of the character of his goods as imposed by Section 4(6) would be negligible indeed. The suggested construction would give Section 4(3) practically no meaning, whereas it was devised to give the shipper "the largest protection that could be devised for him". Moreover, it would fly in the face of the precise wording of the section which is to protect the shipper from liability for loss or damage arising from "any cause" without his neglect.

The further suggestion is made, however (fn. 15, par. 2), that Section 4(3) protects only the shipper and not a subsequent holder of the bill of lading or owner of cargo succeeding to the shipper's rights and obligations. The bill of lading is the shipper's contract and any obligations of a subsequent holder arise only from the fact that the law implies an obligation on his part, as successor to the shipper's interest, to be bound by the shipper's contract obligations. It would be strange indeed if the courts should hold that the subsequent holder undertook to be responsible for anything for which the shipper is not responsible under his bill of lading contract.

In this very case respondent Farr Sugar Corporation was an original shipper, and respondent, American Spirits, Inc., a subsequent holder (R. 73). It would be remarkable if the clause could be enforced against the latter, but not the former.

This very question has been discussed by leading English textwriters who reached the conclusion:

> "It seems clear, therefore, that this Rule protects any person claiming under the shipper no less than the shipper himself." Temperley's Carriage of Goods by Sea Act, 4th ed., pp. 64-65.

The petitioner's arguments on this point are repeated in the Brief for Respondent Belgian Overseas Transports, S. A., pages 36-38, but seem to require no further answer.[21] The argument that the Both-to-Blame clause relates solely to loss or damage suffered by the cargo or the ship "unrelated directly or indirectly to cargo damage" is supported by assertion only. Section 4(3) says loss or damage arising from "any cause".

Counsel for this same respondent also suggest in their brief at page 35 that an awkward situation would arise if the clause were held valid under the Harter Act but invalid under Section 4(3). This is not a legal argument and the suggestion need cause no concern. The Both-to-Blame clause has not been validated by either Act and the prohibition of Section 4(3) is merely confirmatory of that fact.

Actually Section 4(3) is merely a restatement of the basic principle of Anglo-Saxon law that "a cargo owner is not responsible to his carrier or to others for loss or damage caused by his cargo [or otherwise] except where there has been some dereliction of duty on his part". (Brief for Belgian Overseas Transports, S. A., p. 38.)

That principle is violated by the Both-to-Blame clause.

---

[21] See specific Comment on Brief for Respondent Belgian Overseas Transport, S. A., following at p. 45.

CONCLUSION.

The decision of the Court of Appeals that the Both-to-Blame clause is invalid and unenforceable is correct and the order of that Court should be affirmed.

Respectfully submitted,

LEONARD J. MATTESON,
Counsel for Respondents,
Farr Sugar Corporation and
American Spirits, Inc.

BIGHAM, ENGLAR, JONES & HOUSTON,
OSCAR R. HOUSTON,
RICHARD F. SHAW,
JULIAN S. GRAVELY, JR.,
Of Counsel.

COMMENT ON BRIEF FOR RESPONDENT BELGIAN OVERSEAS TRANSPORT, S. A., OWNER OF M. V. "ESSO BELGIUM".

The owner of the "Esso Belgium" has no interest in this case in the issue here presented and is not properly a respondent on the writ granted herein. The liability of the "Esso Beligium" for 100% of the cargo damage is conceded (pp. 1-2) and it is further conceded that that liability will remain even though the Both-to-Blame clause should be upheld (p. 2).

Counsel for this respondent, nevertheless, assert the right to file their brief in support of the Both-to-Blame clause and the position of the petitioner. Their brief was served on counsel for these respondents, without prior notice or consent on Saturday, February 23rd.

Notwithstanding the fact that the brief period remaining before the argument has not permitted counsel for these respondents to prepare a detailed reply, we, nevertheless, welcome this brief for its additional exposure of some of the fallacies which appear to us to exist in the arguments in support of the Both-to-Blame clause. We have at points in our principal brief referred to some of the parallels between the arguments presented by this respondent and the arguments for the petitioner. We shall confine our further comments to two principal features of this brief.

(a) *The Brief for the "Esso Belgium" makes it abundantly clear that the objective of the Both-to-Blame clause is to obtain for shipowners the substantial equivalent of the limitation of cargo rights obtained in foreign countries through the Brussels Collision Convention.*

This was frankly conceded in the courts below (R. 139), but is only hinted at in petitioner's brief (p. 11 and fn. 4).

The argument for this respondent begins by asserting that the United States is the only maritime nation which permits an innocent cargo owner to recover his damages in full from a negligent non-carrier when the carrier is also at fault (p. 2). The reason for this we have shown to be that the principle of thus restricting the rights of innocent persons, as embodied in the English rule of *The Milan*, Lush. Adm. 388, was rejected by this Court in *The Atlas*, 93 U. S. 302, 314-317, *supra*, pp. 36-37, and, as embodied in the Brussels Collision Convention, 1910, has not been approved in the United States because of the opposition of passengers and labor unions (Esso Belgium Brf. 26, fn. 10), as well as of cargo interests, and the great body of admiralty lawyers of this country as represented by the Maritime Law Association of the United States (R. 139).

The brief then refers to page 23 thereof where the efforts to secure ratification of the Convention are referred to. Regardless of the quoted views expressed, the fact is that ratification was opposed and prevented and the Convention finally withdrawn from further consideration.

At page 25 the purpose and effect of the Both-to-Blame clause to accomplish for the shipowners what had failed of accomplishment through the Brussels Convention is clearly stated. Actually it would seem that the determined effort to secure ratification in 1937-8 was in recognition of the fact that the Carriage of Goods by Sea Act, 1936, had not validated the clause. If it had, ratification would have been unimportant. Failing ratification or domestic legislation, the "only recourse" of the shipowners to obtain their objective of limiting the innocent cargo owner's rights, it is stated, is "to seek relief by contractual provision" (Esso Belgium Brf. 27).

Thus lies exposed the assumption by the shipowners of

the right to be legislators, an assumption which we submit was correctly rejected by the Court of Appeals (R. 139).

(b) *The assertion that a carrier may contract "as he pleases with a cargo owner, provided the essential duties owed to the cargo owner by the carrier are not reduced by the contract" is clearly fallacious.*

The above assertion is made in the brief for the owner of the "Esso Belgium", page 15. Statements to substantially the same effect are made at pages 4-5, 6, 16 and 22. This is the essence of the argument in that brief. Note that the emphasis is on the shipowner's pleasure, not the cargo owner's.

At page 4, counsel for the "Esso Belgium" set forth in the form of a syllogism what they characterize as "the fundamental error below". This syllogism quite obviously does not fairly represent the reasoning of the Court of Appeals which rested on much deeper foundations than those for which it is given credit. The argument of counsel for the "Esso Belgium" is, however, quite readily reducible to the form of a syllogism as follows:

Any clause which does not diminish the essential duties which the carrying vessel owes to the shipper is valid.

The Both-to-Blame clause does not diminish the essential duties which the carrying vessel owes to the shipper.

Therefore, the Both-to-Blame clause is valid.

This counsel's conception of the essential duties of the carrier to the cargo owner in a collision case is that they are nil, since the carrier has been relieved of liability to the cargo owner for faults and errors in navigation (pp. 7, 31, 32). Therefore, the argument is that since the carrier has no liability to the cargo owner in a collision case, the carrier may impose on the cargo owner whatever contract he pleases.

This produces the absurd result that in a collision case the shipowner by a similarly drawn clause could require the cargo owner to indemnify the carrier against his entire liability to the non-carrying vessel, and even to pay for the physical damage suffered by his own vessel. He could also obviously require the cargo owner to agree that the cargo owner would not enforce any claim for collision damage against any other ship or owner. How much further he could go would only be limited by the shipowner's imagination.

Clearly the major premise of the shipowner's argument is unsound. Any contract imposed by the shipowner must not only be free from the charge of lessening the carrier's essential duties of its employment but it must also be just and reasonable. We submit that no clause can be considered reasonable which demands an indemnity against the carrier's tort liability to another vessel owner or demands that the innocent cargo owner pay over to the negligent shipowner a substantial part of the proceeds of the cargo owner's unquestioned right of recovery against a negligent non-carrier.

Counsel's argument would prove too much, but it is only by such over-statement of the principles involved that all the arguments in support of the Both-to-Blame clause are made.

In a footnote on page 5, two texts are cited for the proposition that textwriters agree that the Both-to-Blame clause is valid. No such opinions are entitled to more weight than the reasoning which supports them, and these two authors at least are subject to the suspicion of bias. It should be noted that the treatise of Mr. Deutsch, as explained in the introduction to his book, was prepared for the account and benefit of his client, Waterman Steamship Corporation. Mr. Knauth is a former associate of Charles S. Haight, who, in 1938, as paid counsel for foreign steamship companies and their P. and I. underwriters, attempted unsuccessfully to promote the Brussels Convention, 1910, before the Senate Committee. Mr.

Knauth was associated with Mr. Haight in that ill-fated venture and testified at the Committee Hearings.[22]

We shall not attempt to comment further on other features of this brief.

Respectfully submitted,

LEONARD J. MATTESON,
Counsel for Respondents,
Farr Sugar Corporation and
American Spirits, Inc.

BIGHAM, ENGLAR, JONES & HOUSTON,
OSCAR R. HOUSTON,
RICHARD F. SHAW,
JULIAN S. GRAVELY, JR.,
Of Counsel.

---

[22] See Report of Hearings on Brussels Convention, 1910, Before a Subcommittee of the Committee on Foreign Relations, United States Senate, 75th Cong., 3d Sess., January, 1938, pp. 111-113, 158-159.

APPENDIX.

Harter Act, 1893.

THE HARTER ACT

27 U. S. Statutes at Large, 445. 46 U. S. Code, Sec. 190-195
[Feb. 13, 1893.]

Sec. 1. It shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect. 46 U. S. Code, Sec. 190.

Sec. 2. It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided. 46 U. S. Code, Sec. 191.

Sec. 3. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner, or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent or master, be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the

thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service. 46 U. S. Code, Sec. 192.

Sec. 4. It shall be the duty of the owner or owners, master, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described. 46 U. S. Code, Sec. 193.

Sec. 5. For a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States. 46 U. S. Code, Sec. 194.

Sec. 6. This act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statute defining the liability of vessels, their owners, or representatives.

Sec. 7. Sections one and four of this act shall not apply to the transportation of live animals. 46 U. S. Code, Sec. 195.

Carriage of Goods by Sea Act, 1936.

AN ACT

Relating to the carriage of goods by sea.

49 Stat. c. 229, 1207.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this Act: 46 U. S. Code, §1300.

Title I

Section 1. When used in this Act—

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) The term "goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) The term "ship" means any vessel used for the carriage of goods by sea.

(e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship. 46 U. S. Code, §1301.

Risks

Sec. 2. Subject to the provisions of section 6, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth. 46 U. S. Code, §1302.

Responsibilities and Liabilities

Sec. 3. (1) The carrier shall be bound, before and at the beginning of the voyage to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: PROVIDED, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3) (a), (b), and (c), of this section: PROVIDED, That nothing in this Act shall be construed as repealing or limiting the application of any part of the Act, as amended, entitled "An Act relating to bills of lading in interstate and foreign commerce", approved August 29, 1916 (U. S. C., Title 49, secs. 81-124), commonly known as the "Pomerene Bills of Lading Act."

(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: PROVIDED, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

(7) After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading: PROVIDED, That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability. 46 U. S. Code, §1303.

Rights and Immunities

Sec. 4. (1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representatives;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: PROVIDED, That nothing herein contained shall

be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Savings or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this Act or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: PROVIDED, HOWEVER, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per

customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: PROVIDED, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than th amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master, or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any. 46 U. S. Code, §1304.

Surrender of Rights and Immunities and Increase of Responsibilities and Liabilities

Sec. 5. A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this Act, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this Act shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this Act. Nothing in this Act shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average. 46 U. S. Code, §1305.

Special Conditions

Sec. 6. Notwithstanding the provisions of the preceding sections, a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligations as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea: PROVIDED, That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect: PROVIDED, That this section shall not apply to ordinary commercial shipments made in the ordinary course of trade but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement. 46 U. S. Code, §1306.

Sec. 7. Nothing contained in this Act shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea. 46 U. S. Code, §1307.

Sec. 8. The provisions of this Act shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916, or under the provisions of sections 4281 to 4289, inclusive, of the Revised Statutes of the United States, or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels. 46 U. S. Code, §1308.

Title II

Section 9. Nothing contained in this Act shall be construed as permitting a common carrier by water to discriminate between competing shippers similarly placed in time and circumstances, either (a) with respect to their right to demand and receive bills of lading subject to the provisions of this Act; or (b) when issuing such bills of lading, either in the surrender of any of the carrier's rights and immunities or in the increase of any of the carrier's responsibilities and liabilities pursuant to section 5, title I, of this Act; or (c) in any other way prohibited by the Shipping Act, 1916, as amended. 46 U. S. Code, §1309.

Sec. 10. Section 25 of the Interstate Commerce Act is hereby amended by adding the following proviso at the end of paragraph 4 thereof: "Provided, however, That insofar as any bill of lading authorized hereunder relates to the carriage of goods by sea, such bill of lading shall be subject to the provisions of the Carriage of Goods by Sea Act." Repealed by Transportation Act, 1940, 54 Stat. 929.

Sec. 11. Where under the customs of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in this Act, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper. 46 U. S. Code, §1310.

Sec. 12. Nothing in this Act shall be construed as superseding any part of the Act entitled "An Act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property", approved February 13, 1893, or of any other law which would be applicable in the absence of this Act, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded, on or after the time they are discharged from the ship. 46 U. S. Code, §1311.

Sec. 13. This Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this Act the term "United States" includes its districts, territories and possessions: PROVIDED, HOWEVER, That the Philippine Legislature may by law exclude its application to transportation to or from ports of the Philippine Islands. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this Act shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: PROVIDED, HOWEVER, That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this Act, shall be subjected hereto as fully as if subject hereto by the express provisions of this Act: PROVIDED, FURTHER, that every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this Act. 46 U. S. Code, §1312.

Sec. 14. Upon the certification of the Secretary of Commerce that the foreign commerce of the United States in its competition with that of foreign nations is prejudiced by the provisions, or any of them, of title I of this Act, or by the laws of any foreign country or countries relating to the carriage of goods by sea, the President of the United States may, from time to time, by proclama-

tion, suspend any or all provisions of title I of this Act for such periods of time or indefinitely as may be designated in the proclamation. The President may at any time rescind such suspension of title I hereof, and any provisions thereof which may have been suspended shall thereby be reinstated and again apply to contracts thereafter made for the carriage of goods by sea. Any proclamation of suspension or rescission of any such suspension shall take effect on a date named therein, which date shall be not less than ten days from the issue of the proclamation.

Any contract for the carriage of goods by sea, subject to the provisions of this Act, effective during any period when title I hereof, or any part thereof, is suspended, shall be subject to all provisions of law now or hereafter applicable to that part of title I which may have thus been suspended. 46 U. S. Code, §1313.

Sec. 15. This Act shall take effect ninety days after the date of its approval; but nothing in this Act shall apply during a period not to exceed one year following its approval to any contract for the carriage of goods by sea, made before the date on which this Act is approved, nor to any bill of lading or similar document of title issued, whether before or after such date of approval in pursuance of any such contract as aforesaid. 46 U. S. Code, §1314.

Sec. 16. This Act may be cited as the "Carriage of Goods by Sea Act." 46 U. S. Code, §1315.

Approved, April 16, 1936.

Excerpt from Report of Hearing Before the Committee on Commerce, United States Senate, 74th Congress, 1st Session, on S. 1152, A Bill Relating to Carriage of Goods by Sea, May 10, 1935, pp. 51-59.

STATEMENT OF D. ROGER ENGLAR, NEW YORK CITY

Mr. ENGLAR. Mr. Chairman, my name is D. Roger Englar, lawyer, of the firm of Bigham, Englar, Jones & Houston, 99 John Street, New York City, appearing for the American Institute of Marine Underwriters.

I dislike very much to be the first to introduce a discordant note in this harmonious situation.

The CHAIRMAN. That is the reason you are standing up.

Mr. ENGLAR. Yes; and as a matter of fact I am accustomed to standing up when I speak, and I don't mind it.

The CHAIRMAN. We rather like it, because the witnesses do not take so long when they stand up.

Mr. ENGLAR. That is another advantage.

The American Institute of Marine Underwriters is composed of practically all of the marine insurance companies who do business in this country. They insure, I should say, the majority of the cargo going to and from this country by sea, and they are, therefore, one of the parties very vitally interested in the conditions of carriage, and the responsibility of steamship companies, because if its goods are not carried and delivered the members of this institute are the ones who are called upon to pay for it.

They have, from the beginning of the history of these rules, supported them. They have been represented here at all of the hearings. On the original White bill, I think, down to the 1930 conference of the Chamber of Commerce, and was parties to that agreement to which Colonel Barber has referred.

The only thing that has modified their position is this, that within the past few months the leading steamship companies, or at least members of some of the leading steamship conferences have announced their intention of inserting in their bills of lading a clause which the underwriters consider very, very objectionable.

The CHAIRMAN. What is that clause?

Mr. ENGLAR. If I may, I will just hand you a copy of it,

which I will ask be read into the record, and it is as follows:

> If the shipowner shall have exercised due diligence to make the ship seaworthy and properly manned, equipped, and supplied, it is hereby agreed that in the event of the ship coming into collision with another ship as a result of the negligent navigation of both ships, the owners of the cargo carried under this bill of lading will indemnify the shipowner against all liability to the other ship or her owners insofar as such liability represents loss, damage, or claim of said cargo paid or payable by the other ship or her owners to the said cargo owners and set off, recouped or recovered by the other ship or her owners as part of their claim against the carrying ship or shipowner.

That is what is known as the "both-to-blame collision" clause.

The CHAIRMAN. I would like to ask you this question: You are familiar with the British limitation of liability.

Mr. ENGLAR. I am; yes.

The CHAIRMAN. Does this bill go beyond that?

Mr. ENGLAR. This bill does not affect that at all. It expressly provides that these rules as set forth in this statement shall not affect the law as to limitation of shipowners' liability, and that whole field is left out of this law. This is a law designed solely to regulate what can be put in the bill of lading. In other words, it is a sort of statutory bill of lading, but does not affect the general law as to limitation of shipowners' liability.

What we object to in this clause, this so-called "both-to-blame collision" clause, is that it is a clause under which the owner of the cargo is required to indemnify the shipowner against the shipowners' liability to a third party for the negligence of his servants.

We must say that is beyond any clause we had in mind in agreeing to this legislation and to the League* rules. We think undoubtedly if that clause had been suggested

---

* Should read "Hague".

when the rules were originally drawn it would have been expressly prohibited.

Owing to the fact it has only been introduced lately, of course the rules make no provision for it.

The introduction of that clause threw the membership of the institute which I represent into a position of some uncertainty.

Prior to that, the membership of the institute, consisting of hundreds of insurance companies, had been unanimous in supporting this legislation, but since the introduction of that clause by the shipowners, that unanimity in the ranks of the association no longer exists, and therefore I was instructed to introduce a suggested amendment of the rules. It was made very clear to me that unless that were suggested, some of the members of the institute would come down here independently of the institute and would want to be heard on this issue.

I was able to accomplish this much yesterday. In conference with the various members of the institute, I took the position that we suggest this amendment which we think is a desirable and proper amendment, but that we further take the position we do not wish to be the ones who prevent the adoption of this constructive legislation, and if it develops that this suggested amendment is the only obstacle in the way of this legislation, we do not oppose the rule, nor do we oppose the legislation.

I make that statement so that if, as has been suggested here, you have complete harmony and I am the only man out of step, I have the authority to say we will not oppose the rules even if this amendment is not adopted.

The CHAIRMAN. Will you please make very clear for the record what is the suggestion if the law is enacted as proposed; and then afterward tell us what it is will be changed if we should accept your proposed amendment.

Mr. ENGLAR. I will be glad to do that. I have prepared a very brief and concise statement of the situation to submit to you.

The CHAIRMAN. Does it cover that situation?

Mr. ENGLAR. It does, and I would like to put that in the record, because it is clearly stated, and then I will be glad to further discuss it as much as the committee desires.

Excerpt from Report of Hearing Before the Committee on Commerce, etc.

The CHAIRMAN. That statement may be inserted in the record.

(The statement of Mr. Englar referred to is as follows:)

I appear on behalf of the American Institute of Marine Underwriters.

The institute includes in its membership almost all of the companies engaged in writing marine insurance in this country. Its members are, therefore, directly and vitally interested in matters affecting the responsibility of ocean carriers of goods entrusted to such carriers for transportation. More than 10 years ago the institute carefully considered the Hague Rules and adopted a resolution approving the rules subject to a few necessary amendments. The institute has consistently adhered to that position and has maintained at all times a special committee charged with the duty of supporting the rules and endeavoring to bring about legislation to put the rules into effect in this country.

During the last few months, however, a new situation has arisen owing to the adoption by certain steamship lines of a bill-of-lading clause which the institute considers highly objectionable. One of the important steamship conferences has recently announced that all of its members propose to insert this clause in their bills of lading.

The clause, which is commonly referred to as the "both-to-blame collision" clause, reads as follows:

"If the shipowner shall have exercised due diligence to make the ship seaworthy and properly manned, equipped, and supplied, it is hereby agreed that in the event of the ship coming into collision with another ship as a result of the negligent navigation of both ships, the owners of the cargo carried under this bill of lading will indemnify the shipowner against all liability to the other ship or her owners insofar as such liability represents loss, damage, or claim of said cargo paid or payable by the other ship or her owners to the said cargo owners and set off, recouped, or recovered by the other ship or her owners as part

of their claim against the carrying ship or shipowner."

The clause requires the owner of the cargo to indemnify the shipowner against the shipowner's liability to a third party for the negligence of the shipowner's servants. Naturally, this clause is highly objectionable to the owners and underwriters of cargo, and they would not accept any code or set of rules under which such a clause was permissible.

A careful study of the above bill has satisfied the institute that the clause above quoted is prohibited by section 4 (3) of the bill, which reads as follows:

"The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants."

The institute, therefore, supports the bill, but suggests that section 4 (3) be amended to read as follows:

The shipper *or owner of the goods* shall not be responsible for loss or damage sustained, *or liability therefore incurred*, by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants. *Any cause or stipulation which seeks to impose liability contrary to the foregoing shall be null and void, including any clause or stipulation requiring the owner or cargo to indemnify the ship or carrier against liability to a colliding vessel for any part of the collision damages paid or payable by such colliding vessel.* (New matter italicized.)

In support of the suggested amendment I am instructed to point out that the principal argument in favor of this legislation has been that, if it is enacted, it will no longer be necessary to make a detailed study of the voluminous provisions of ocean bills of lading, which now include hundreds of lines of small print. The argument has been that anything in the bill of lading which purported to modify the respective rights and liabilities of cargo and carrier, as set forth in the statute, would be invalid. That this is the in-

tent of the statute appears from section 3 (8), which reads as follows:

"Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability *otherwise than as provided in this act, shall* be null and void, and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability."

The institute, therefore, considers that if it were permissible to use the so-called "Both-to-blame collision" clause, after the adoption of the statute, the intent and, indeed, the whole purpose of the statute would be defeated.

Under these circumstances it will naturally be argued that, if the statute in its present form is clear, no amendment is necessary. Our answer to this argument is that the objectionable clause has only recently been introduced, and it must be anticipated that the carriers will make a determined effort to sustain it. Its validity will undoubtedly be the subject of protracted litigation. The purpose of the rules is to avoid such litigation, and if the objectionable clause has been introduced at the time the Hague rules were formulated, it would undoubtedly have been prohibited by express reference. This was done in the case of a far less objectionable clause, i. e., "The benefit-of-insurance clause," which is specifically referred to in section 3 (8).

The institute, therefore, urges the amendment of 4 (3) above quoted, and, if this amendment is not adopted, the Institute desires specifically to reserve the privilege of urging appropriate legislation dealing expressly with the objectionable "Both-to-blame collision" clause.

The CHAIRMAN. This matter of limitation of liability is a very pertinent one to the American people, as is shown

by the recent disaster of the *Mohawk* and the *Morro Castle.*

It was rather shocking to find that under the American laws as they exist today, speaking about personal damages first, the only recourse the survivors have is the value of the hull, whatever is left after the fire, and the amount of freight which was paid on that cargo. That was a very small amount in the case of the *Morro Castle*, and if I remember it was not more than $50,000.

Mr. ENGLAR. That is approximately so, and it was also very small in the case of the *Titanic.*

The CHAIRMAN. Yes; and so far as loss or damage to persons from loss of life, I am sure Congress will insist on a material change to the existing law. So far as our subcommittee is concerned on the investigation of the *Morro Castle* and the *Mohawk* we have given no consideration to the question of damage or loss of cargo, and that is the thing you have in mind now, is it not?

Mr. ENGLAR. Yes; that is.

The CHAIRMAN. If I remember correctly, in the British laws there is a provision of £8 per ton.

Mr. ENGLAR. £8 per ton for loss of life and £7 per ton for cargo losses, and the cargo cannot share in the £8, but the loss of life, if not satisfied out of the £8, can come in and prorate also in the £7.

The CHAIRMAN. What would happen if we would accept your amendment?

Mr. ENGLAR. My amendment, sir, would have no bearing on that at all, because the shipowner would still have his right to limit liability. If his ship were lost this would not impose any liability on him and would not touch that at all. In fact, this does not touch the present law as it exists. It deals entirely with the bills of lading, and simply says that the shipowner cannot put in the bill of lading a provision that the cargo owner shall be liable to the shipowner for loss or damage sustained. It simply prevents that clause being put in the contract.

The CHAIRMAN. So far as the shipper is concerned, if your amendment were adopted it would go back to the liability of the owner of the ship.

Mr ENGLAR. It would not affect his present liability

at all, but would simply prevent him from taking his present liability and saddling it back on us.

The CHAIRMAN. Does the shipowner not insure his ship for that?

Mr. ENGLAR. I am not speaking of hull insurance, because these people I represent are insurers of cargo.

The CHAIRMAN. That is the only recourse he has?

Mr. ENGLAR. The shipowner of course has insurance, and that would be covered by what we call the "P. and I." insurance, protection and indemnity insurance.

The CHAIRMAN. That is separate and apart from this.

Mr. ENGLAR. Yes, sir; entirely separate and apart.

You will often hear it said that these shippers are already insured, and it does not matter, but that is not an accurate statement. I admit most of them have insurance, but a great many of them are not fully insured.

In other words, there are various grades of insurance, some of them are insured only against total loss, and they have not anything like complete insurance, so that the shipper has a very real interest in this.

I attended this meeting this morning at the chamber of commerce which has been discussed by these gentlemen who have spoken, and I think their position is they do not agree with me as to the importance of this, but their position is it does not affect us under the Hague rules, and it can be taken care of separately. They urged me not to be the one to prevent the otherwise complete agreement, and I yielded to them. I do not say we oppose these rules if the amendment is not adopted, but I do say I think the rules in their present form, and that the bill 1152 in its present form, does not [specifically]* invalidate this objectionable clause, and I do not think they will ever be finally settled short of the Supreme Court, and I do not myself see any use in adopting rules then having years of litigation to determine the meaning of sections 3 and 4.

Therefore, as long as this clause has come up, my suggestion here is that we deal with it specifically; but

---

* Word "specifically" obviously omitted from text by inadvertence. *Cf.* 6th line following, and purport of prepared statement, *supra*, p. 31.

if that will be the final straw which prevents the adoption of the law, I will waive it.

I want to say to you, Mr. Chairman, since you have indicated you are here rather in the capacity of a recorder or observer, if this matter is not taken care of in the bill 1152, I want it understood we reserve the privilege of coming around to your committee in other connections and urging relief from that clause.

It does not have to be done under the Hague rules I can see, but I do not want it understood we accept the Hague rules as final disposition of our rights. We would like to have it taken care of, and if it cannot be taken care of here, we will not go on record as opposing the rules.

The CHAIRMAN. As this is written, on page 8, line 15, it says, "The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants."

Mr. ENGLAR. Mr. Chairman, that, in my opinion, ought to say, "shipper or owner of goods." The shipper very often is a mere nominee without interest in the goods after they are shipped, and you will notice in other sections we speak of the carrier and the ship, and it seems to me when they say shipper, they should say shipper or owner of the goods in the interest of clarifying the clause.

The CHAIRMAN. So that the shipper or owner of the goods would not be responsible for loss or damage arising or resulting from any cause as provided on page 8, and you want to add to that?

Mr. ENGLAR. I put in there loss or damage sustained, or liability thereon incurred.

The CHAIRMAN. Then you want further to include:

> Any clause or stipulation which seeks to impose liability contrary to the foregoing shall be null and void, including any clause or stipulation requiring the owner of cargo to indemnify the ship or carrier against liability to a colliding vessel for any part of the collision damages paid or payable by such colliding vessel.

That is what you propose.

Mr. ENGLAR. Yes; although I think even without that last sentence the two previous amendments would very much clarify the clause.

Senator GIBSON. The insurance companies included within the organization you represent are writers of what kind of insurance?

Mr. ENGLAR. Cargo underwriters.

Senator GIBSON. Only cargo underwriters?

Mr. ENGLAR. Yes; of course, they insure in other branches and do various kinds of business; but this institute I represent has nothing to do with that. I think I may say the bulk of their business is cargo business, and that is what the institute deals with.

The CHAIRMAN. There is a lot of foreign capital involved in this institute, is there not?

Mr. ENGLAR. It is not an organization that has any capital.

The CHAIRMAN. I mean you have companies in your organization that are not American companies.

Mr. ENGLAR. Yes; there are foreign companies in there; in other words, all of the foreign companies that do business in our country are in there, but a great majority of the membership is American.

The CHAIRMAN. Is most of the underwriting taken over by foreign companies?

Mr. ENGLAR. Not by any means.

The CHAIRMAN. What proportion would you say, offhand?

Mr. ENGLAR. You are speaking, I suppose, of foreign companies who are admitted to do business in this country, because they are the ones who are members of the institute.

The CHAIRMAN. That is what I mean.

Mr. ENGLAR. I should say their total business in this field might be 20 percent or 25 percent of the total, but that is a pure guess, you understand.

The CHAIRMAN. Would the same proportion hold as regards insurance of the ship?

Mr. ENGLAR. Well, as to that, there is a specific provision. You see, that hull insurance is controlled by the

Excerpt from Report of Hearing Before the Committee on Commerce, etc.

American Marine Insurance Syndicate, which we formed at the suggestion of the Shipping Board back in 1923, and they have a specific provision in their constitution that the foreign companies cannot have more than a fixed proportion, which I think is one-third. The constitution of the institute provides their interest cannot be more than one-third of the total, but I do not think it has reached that proportion so far.

Senator GIBSON. The chairman has referred to the *Morro Castle*. What was the cargo insurance on that boat?

Mr. ENGLAR. It was partly insured with the American companies, and, of course, it is very difficult to separate that from the foreign companies.

Senator GIBSON. I am not asking you to separate them, but what was the gross cargo insurance carried on that vessel?

Mr. ENGLAR. I have forgotten what the values were there, but my recollection is it was two or three hundred thousand dollars. Perhaps Mr. Chester, who is here, could tell you.

Mr. CHESTER. My recollection is it was about one half of a million dollars, but I think a great deal of the cargo was transshipment cargo from abroad with the insurance issued in Germany, England, and other places.

Mr. ENGLAR. When I said two or three hundred thousand dollars, I had in mind what I think was the loss to the American insurance companies. As Mr. Chester says, goods that came here from abroad and were transshipped on the *Morro Castle* were in many cases insured at the point of origin, and that would carry through to Cuba.

Senator GIBSON. What I was really interested in was, did the insurance companies of America make any independent investigation as to the cause of the disaster.

Mr. ENGLAR. Yes; they did.

Senator GIBSON. Did they come to any definite conclusion?

Mr. ENGLAR. I do not think they did. Our firm made the investigation for them, and we are not prepared to announce any definite conclusion.

Excerpt from Report of Hearing Before the Committee on Commerce, etc.

The CHAIRMAN. How much of an investigation did you make?

Mr. ENGLAR. We made a very elaborate investigation. One of my partners went on board the ship, when she was aground, with engineers and experts, and went over their plans and discussed it with many witnesses. We made a very elaborate investigation.

The CHAIRMAN. Are you willing to turn that over to this committee of ours?

Mr. ENGLAR. Most assuredly.

The CHAIRMAN. Have you been asked for it yet?

Mr. ENGLAR. No, sir.

The CHAIRMAN. We have a special committee of the Senate investigating that, and we want all of the information we can have. We have not lost any time, because we have been going over the Steamboat Inspection Service, and we hope to have before long the minutes of the grand jury in this case; and, as I understand, you made an independent investigation.

Mr. ENGLAR. Yes; we did.

The CHAIRMAN. You say you reached no definite conclusion?

Mr. ENGLAR. We have not reached any definite conclusion. Of course, you understand when I speak of a conclusion I am speaking of something we can establish in court, and that means you must have definite evidence.

The CHAIRMAN. You have some moral conclusions?

Mr. ENGLAR. Yes; we have very conclusive moral conclusions.

The CHAIRMAN. Will you prepare yourself to give that to us?

Mr. ENGLAR. I will be glad, sir. I do not know that I, individually, would be the one to give it to you, because I did not personally make the investigation, but the individuals who have the information will be glad to attend at the convenience of your committee.

Senator GIBSON. Did you make a similar investigation with respect to the *Mohawk*?

Mr. ENGLAR. Yes, sir; we did.

Senator GIBSON. Did you arrive at any conclusions?

Mr. ENGLAR. We arrived at some very definite conclusions in that case.

Excerpt from Report of Hearing Before the Committee on Commerce, etc.

The CHAIRMAN. That is under investigation, too, and I would appreciate it very much if you will leave with the clerk of this committee the names of the persons we can call to get this information, because we must have it.

Mr. ENGLAR. I will be glad to write that in to you. I will have to get the names after I return and look into it.

Mr. BARBER. Mr. Chairman, may I make one statement in behalf of the conference?

The CHAIRMAN. Certainly, Colonel Barber.

Mr. BARBER. I would like to say on behalf of the conference held this morning that after discussion of the matters referred to by Mr. Englar the conference asked me to state to the committee here that the conference recommends that the amendment be not made as part of the present legislation.

The CHAIRMAN. Mr. Englar has been very generous about that.

Mr. BARBER. I think if you want an explanation from the other side, from a legal point of view, perhaps we would ask Mr. Walter to explain to you why we did not want it to be made a part of this legislation.

The CHAIRMAN. We would be glad to have you do that.

Mr. BARBER. Mr. Walter, will you please make an explanation of this to the committee?

Mr. WALTER. You will notice, page 4 of the bill and the succeeding pages over to page 10 deals with rights and immunities.

Paragraph 1 of section 4, on page 6, says that neither the carrier nor the ship shall be liable for certain things.

Paragraph 2 of the same section says neither the carrier nor the ship shall be responsible for loss or damage resulting from specific items included in subparagraph (a) to subparagraph (p).

Then, paragraph 3 says the ship shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

A clause has been recently incorporated in some bills of lading, to which Mr. Englar referred, which does violate provision 3 of the section referred to, and therefore could

not be enforced, because the very enacting clause—lines 3 to 6 at the beginning of the act—say:

> That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this act.

Therefore, where a bill of lading goes beyond and conflicts with this paragraph 3 of section 4, I think, with the exception of Mr. Englar's suggestion of the word "owner", it cannot be enforced so far as the shipper is concerned.

The CHAIRMAN. Are you willing to have inserted in line 15 after the word "shipper", as Mr. Englar has suggested, the words "or owners of goods"?

Mr. WALTER. Yes; I would be willing to have that inserted, but I would not want to do it if there is anybody who would object to the word "owner." If there is no objection, I would like to have everybody stand up and say so or forever hereafter hold his peace.

Mr. KEATING. I object.

The CHAIRMAN. However, Mr. Walter, you want it as is.

Mr. WALTER. Yes; I want it as is, and Mr. Keating for the shipowners wants it as is.

Of course there is one other thing I would call to your attention, when they talk about getting rid of litigation, you must not overlook the fact that lawyers have to live.

The CHAIRMAN. My observation is that lawyers do.

Is there anything further you want to say, Mr. Walter?

Mr. WALTER. No, Mr. Chairman.

The CHAIRMAN. We will now hear from Mr. Keating.

LIBRARY
SUPREME COURT, U.S.

No. 480

Office - Supreme Court, U. S.
FILED
MAR 1 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1951

UNITED STATES OF AMERICA,
Petitioner

v.

ATLANTIC MUTUAL INSURANCE COMPANY, FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION BY ROSCOE H. HUPPER, ESQ., FOR ALLOWANCE OF TIME TO ARGUE AS COUNSEL ON BEHALF OF PETITIONER'S SUBROGATED LIABILITY UNDERWRITERS

PAUL D. PAGE, JR.,
of Counsel.

IN THE

Supreme Court of the United States

October Term, 1951

No. 450

UNITED STATES OF AMERICA,
Petitioner,
v.
ATLANTIC MUTUAL INSURANCE COMPANY, FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION BY ROSCOE H. HUPPER, ESQ., FOR ALLOWANCE OF TIME TO ARGUE AS COUNSEL ON BEHALF OF PETITIONER'S SUBROGATED LIABILITY UNDERWRITERS

ROSCOE H. HUPPER, of 27 William Street, New York City, member of the Bar of this Court since November 3, 1915, hereinafter called "Subscriber", hereby moves the Court for an allowance of time for argument by him in the foregoing Docket 450, and in aid thereof respectfully represents:

1. The controversy herein concerns a clause in a uniform bill of lading for maritime commerce commonly known as the "Both-to-Blame" collision clause. Its general purpose is to regulate the incidence of money damages sustained by owners of cargo on one ship (or both) when each of two ships is in some measure at fault for a collision between them in navigable waters. This clause is found in the currently-used bill of lading prepared in 1937 by the

Uniform Bill of Lading Committee, of which Subscriber was Chairman. The validity of the clause (which is the issue in this case) is of great commercial importance but presents no "governmental" or political problem.

2. The collision, November 24, 1942, in New York Harbor, between the steamship NATHANIEL BACON, owned by the United States, petitioner herein, and the Motor Vessel Esso BELGIUM, owned by a Belgian corporation, was of the nature above described. This was determined on the basis of facts developed in the collision litigation had in the District Court for the Southern District of New York. By authorized agreement between counsel for the respective parties R. 71-78, without requiring a formal decision by the Court, the collision feature of the litigation was so settled by interlocutory decree R. 113, 119—but with segregation and exception of the feature next below noted.

3. Excepted from and not determined in the collision branch of the litigation was the matter of the validity of the "Both-to-Blame" clause. The terms thereof are at R. 58, fol. 173. That is the focus of the presently pending branch of the litigation. The cargo on board the NATHANIEL BACON and damaged in the collision had been shipped under bills of lading containing said "Both-to-Blame" clause, which was and is in customary use. That clause purports to impose a refunding liability on the owners of the Bacon's cargo in respect of damage thereto caused by said collision.

4. This segregated bill of lading matter was tried in the District Court before Medina, D. J., who rendered his decision upholding the "Both-to-Blame" clause May 9, 1950, R. 101-113. The Court of Appeals for the Second Circuit reversed that decision August 31, 1951, with dissent by A. N. Hand, C. J., R. 135-48. The petition for *certiorari* herein was granted by this Court January 14, 1952, on the basis of general importance of the question.

5. The liability of the petitioner as carrier under the bills of lading for cargo damage, including that affected by

the "Both-to-Blame" clause, was covered by Protection and Indemnity insurance under the usual form of policy in such cases. This was arranged and administered by Fulton P & I Underwriting Agency, Inc., at New York, being Attorney and/or Agent of the several Assurers, 6 well-known American insurance companies. The total liability was apportioned between them in respective several amounts totaling 100%. The policy contained the usual provision for coöperation by the Assured with the Assurers "in the defense of any claim or suit or in the appeal from any judgment, in respect of any occurrence as hereinbefore provided."

6. The agreed coöperation has been had throughout the entire litigation involving the bill of lading. The Subscriber and his associates in the firm of Burlingham, Veeder, Clark & Hupper, 27 William Street, New York City, have collaborated with the Department of Justice and the Solicitor General of the United States in the preparation of the Petition for *Certiorari* and of the brief for petitioner filed herein. His name has, by his request, been included by the Solicitor General among the counsel thereon named. He argued the appeal before the Court of Appeals. His firm handled the bill of lading branch of the litigation before the District Court. All this was done pursuant to employment and direction by Fulton P & I Underwriting Agency, Inc., on behalf of the 6 Assurers (underwriters) aforesaid. These several steps were for protection of their interest under the aforesaid policy by which all liability in respect of the damage to cargo on the BACON rested on them except for a "deductible" of $2500. That minor sum would in any event be the limit of petitioner's liability in respect of cargo.

7. The cargo damages chargeable (except for said insurance) against petitioner in respect of the collision were $45,345.06, as determined by agreement of the parties, pending the entry of a final decree in the District Court. Of this amount, only $2500 would be borne by petitioner,

in view of being protected by the aforesaid insurance against the balance of $42,845.06. The Assurers are subrogated to all rights of petitioner under the bill of lading in respect of that sum.

8. Thus the interest of the Assurers in this controversy is some 17 times that of petitioner, whose interest they have protected and still continue to protect, from which circumstance the subrogation of Assurers is derived. Their respective interests are of exactly the same nature in legal principle, without any divergence whatsoever. They are directed jointly to the "Both-to-Blame" clause being upheld, by reversal of the August 31, 1951 decision of the Court of Appeals and affirmance of the May 9, 1950 decision of the District Court. Before the settlement mentioned in Paragraph 2 hereof was made, the underwriters confirmed to petitioner that the insurance liability as the same might develop would be duly paid to petitioner. See pages 16-18 hereof, *infra*.

9. Because of the several foregoing facts and circumstances, including particularly their overwhelming comparative interest (17 to 1) the aforesaid Assureds of petitioner, through Fulton, etc. Agency aforesaid, have represented to and requested of the Subscriber that he should argue this case before this Court on their behalf, having regard also to due protection of the interest of petitioner. That interest is exactly the same as their interest, in that reversal of the decision of the Court of Appeals would relieve petitioner of a present liability of $2,500. (by way of the "deductible"), at the same time that said Underwriters would thereby be relieved of their present liability for the $42,845.06 balance. On the other hand, affirmance would not increase or otherwise alter the present respective liabilities above indicated. The Subscriber has agreed to perform the service thus requested and has tendered his services in that regard to petitioner through the Solicitor General. See p. 7, *infra*. The argument is expected to be had on Thursday, March 6, 1952, or soon thereafter.

10. Subscriber has used his best efforts to arrange the matter of argument as thus requested by his clients but has not been able to secure the concurrence of the Solicitor General.

11. Annexed hereto on pp. 7-20 are complete and true copies of the several items of correspondence in the premises, as exchanged between Subscriber and the Solicitor General. Being reasonably brief, there is no need to set forth here any particular items thereof. Subscriber deems it in order, nevertheless, to mention his considered belief that no such matter of policy is involved in this Docket 450 as would require argument by the Solicitor General rather than by private counsel as named on petitioner's brief. This is because the interest of Subscriber's clients and that of the petitioner coincide in principle exactly and absolutely; because the subject matter is purely commercial and related only to maritime commerce, in the conduct of which under bills of lading the interests of private shipowners and carriers as well as those of their protecting Underwriters overwhelmingly predominate. The greatly preponderating financial interest of the subrogated Assurers (underwriters) here is emphasized above.

12. Subscriber believes and represents that the position taken by the Solicitor General in his letters to Subscriber dated February 11 and 26 fails to regard adequately the true realities and rights of the situation; and that it would be highly inequitable and unjust that the subrogated Assurers be excluded and prohibited from having this matter argued in their behalf by counsel of their choice. Subscriber is informed that completion of very many General Average statements, likewise determination and conclusion of many other pending suits, await the guidance that shall result from the decision of this Court. By reason of his dealings in admiralty affairs he is aware and therefore states that the shipping and commercial community throughout the United States, and also other countries, are broadly and deeply interested in said decision for the settled determina-

tion it shall make of this "Both-to-Blame" bill of lading matter. No domestic or international matters of political consequence or bearing are involved. Petitioner does not normally act as carrier in the sense that it was operating the NATHANIEL BACON in November 1942 as part of war-time activities.

WHEREFORE, Subscriber requests that, on consideration of the premises and in the interest of justice, this Honorable Court fix and allow to Subscriber as counsel for the subrogated Assurers appropriate time for argument on their behalf. Subscriber does not seek time in excess of that provided for in the Rules, but undertakes hereby to argue the entire case from the side of his clients in substantially less than said period.

The Solicitor General has been duly notified by telegram of the making of this motion (see p. 20, *infra*). Copies of these motion papers are being submitted to his office, likewise to other counsel of record, in advance of their being presented to this Court.

All of which is respectfully submitted,

ROSCOE H. HUPPER
Subscriber

New York, N. Y. February 29, 1952.

PAUL D. PAGE, JR.,
of Counsel

Letterhead of

BURLINGHAM, VEEDER, CLARK & HUPPER
27 William Street
New York 5

February 7, 1952

NATHANIEL BACON—
ESSO BELGIUM
Collision November 24, 1942
"Both-to-Blame"
Bill of Lading Collision Clause
Certiorari in U. S. Supreme Court

Dear Mr. Solicitor General:

Referring to the *certiorari* granted recently by the Supreme Court on your application, in which we collaborated as counsel for the involved underwriters, we understand that the argument is presently expected to take place about March 7 next.

We have also been pleased to collaborate with your office in preparation of the brief due to be served on opposing counsel and filed in the Supreme Court February 15.

We are also pleased to tender our services to argue this appeal in the Supreme Court, free of any expense to the Government. In connection with this, we suggest that the name of the writer undersigned, Roscoe H. Hupper, being a long-time member of the bar of the Court, be affixed to the brief as counsel, which course we believe would be good order in the circumstances of this matter.

Our firm handled this matter in the District Court, where the decision of Judge Medina was favorable; likewise in the Court of Appeals, where Judge Clark wrote the reversal, with Judge A. N. Hand filing a dissent.

The interest of the Government is protected under the usual form of "Protection and Indemnity" policy issued on behalf of six important insurance companies of long-standing and high responsibility. Proceedings under this policy are handled by Messrs. Fulton P. & I. Agency here, who engaged our firm to handle the matter in their interest —a collision between the two above vessels (the BACON owned by the Government) being the major matter involved; the "both-to-blame" clause in bills of lading was also involved in respect of cargo on the BACON. This clause became prominent because the collision controversy was disposed of on the basis of both ships being to blame, with owners of cargo on the BACON therefore claiming against the Esso BELGIUM.

The insurance policy protecting the BACON interest contained the usual clause requiring the assured (BACON and its owners) to coöperate with the underwriters "in the defense of any claim or suit or in the appeal from any judgment", etc. This coöperation has been complete from the beginning, and the U. S. Attorney's office here required that the underwriters, through us as their counsel, should handle the matter, inasmuch as liability rested on them in event of the clause being held invalid—except as to a usual $2500 deductible. This outline shows the mutual position as concerns the insurance, which means that the above underwriters have the sole interest in this litigation except for the $2500 deductible.

The money amount involved in this particular controversy is a total of around $45,000. There are, however, many other similar situations pending, some involving very large amounts, wherein court decisions and settlements cannot readily be made or general average statements concluded, until this particular litigation is disposed of by the Supreme Court's decision—which will surely guide further activities in respect of the "both-to-blame" clause.

The writer was Chairman of the Uniform Bill of Lading Committee, which in 1937 prepared the current form of lad-

ing, including the "both-to-blame" clause. There is a great deal of maritime law background in this pending situation, including various features of collision law and decisions, the limited liability laws and amendments from 1851, the Harter Act, the Carriage of Goods by Sea Act, the Brussels' Convention, practices of general average adjusters, provisions of various types of insurance, etc., etc. Indeed, the case involves or may develop about as many complications as one might readily imagine to show up in the course of an argument; it is naturally of much interest to the maritime commercial world not only here but likewise abroad.

In relation to this comment, we noted only today that Lloyd's List, London, in a recent issue has printed Judge Clark's opinion.

Although we do not pretend to possess powers of argument superior to those of any other counsel, nevertheless we believe that our considerable experience and rather special information on various points involved as above mentioned, among others, well justifies our arguing this particular case as above suggested.

We await your advices at convenience.

Very respectfully yours,

Roscoe H. Hupper (Sgd.)

RHH:S

Hon. Philip B. Perlman,
Solicitor General of the United States,
Department of Justice,
Washington, D. C.

[EMBLEM]

Letterhead of

OFFICE OF THE SOLICITOR GENERAL

Washington, D. C.

February 11, 1952

ROSCOE H. HUPPER, ESQUIRE,
BURLINGHAM, VEEDER, CLARK & HUPPER,
27 William Street,
New York 5, N. Y.

Re: *United States* v. *Atlantic Mutual Ins. Co., et al., No. 450, Oct. Term, 1951.*

Dear Mr. Hupper:

I have your letter of February 7, 1952, relating to the briefing and argument of the above-entitled case. You point out that your firm, as counsel for Protection and Indemnity underwriters, bore the primary responsibility for briefing and arguing the case in the courts below, and you offer your services to argue it in the Supreme Court.

This office has been glad to cooperate with your firm in the preparation of the brief for the United States, and we are grateful both for the many useful suggestions which have been made available to us, particularly by Mr. Haller of your firm, and for the cooperative spirit in which they have been made. I agree that it would be entirely appropriate and desirable for the name of yourself and any other members of your firm that you may designate to be affixed to the brief as of counsel, and we will be happy to follow your suggestion in this respect.

With respect to the argument of the case, I regret that I am unable to accept your offer. It has been the general policy of this office that in cases in which the United States is a party the United States shall be represented in the

Supreme Court by the Solicitor General, or by an attorney of the Department of Justice or another federal agency who is designated by me and presents the case subject to the supervision of this office. This policy is intended to assure the Supreme Court, so far as possible, of consistency in the presentation of the views of the United States. It has been applied in cases in Admiralty in which, as in the present case, counsel for Protection and Indemnity underwriters bore the major responsibility in the courts below. See, *e.g.*, *McMahon* v. *United States*, 342 U. S. 25; *Warren* v. *United States*, 340 U. S. 523; *Black Diamond* v. *Stewart & Sons*, 336 U. S. 386. To depart from it here might invite a feeling on the part of the Court that this office disclaimed responsibility for the position urged on behalf of the United States by private counsel.

I appreciate the spirit in which your offer is made. Needless to say, we shall be happy to receive any suggestions which you may care to offer respecting the presentation of the argument.

Sincerely yours,

Philip B. Perlman

PHILIP B. PERLMAN,
Solicitor General.

Letterhead of

BURLINGHAM, VEEDER, CLARK & HUPPER
27 William Street
New York 5

FEBRUARY 18, 1952

Re: UNITED STATES *v.*
ATLANTIC MUTUAL INS. CO., *et al.*
No. 450, Oct. Term, 1951

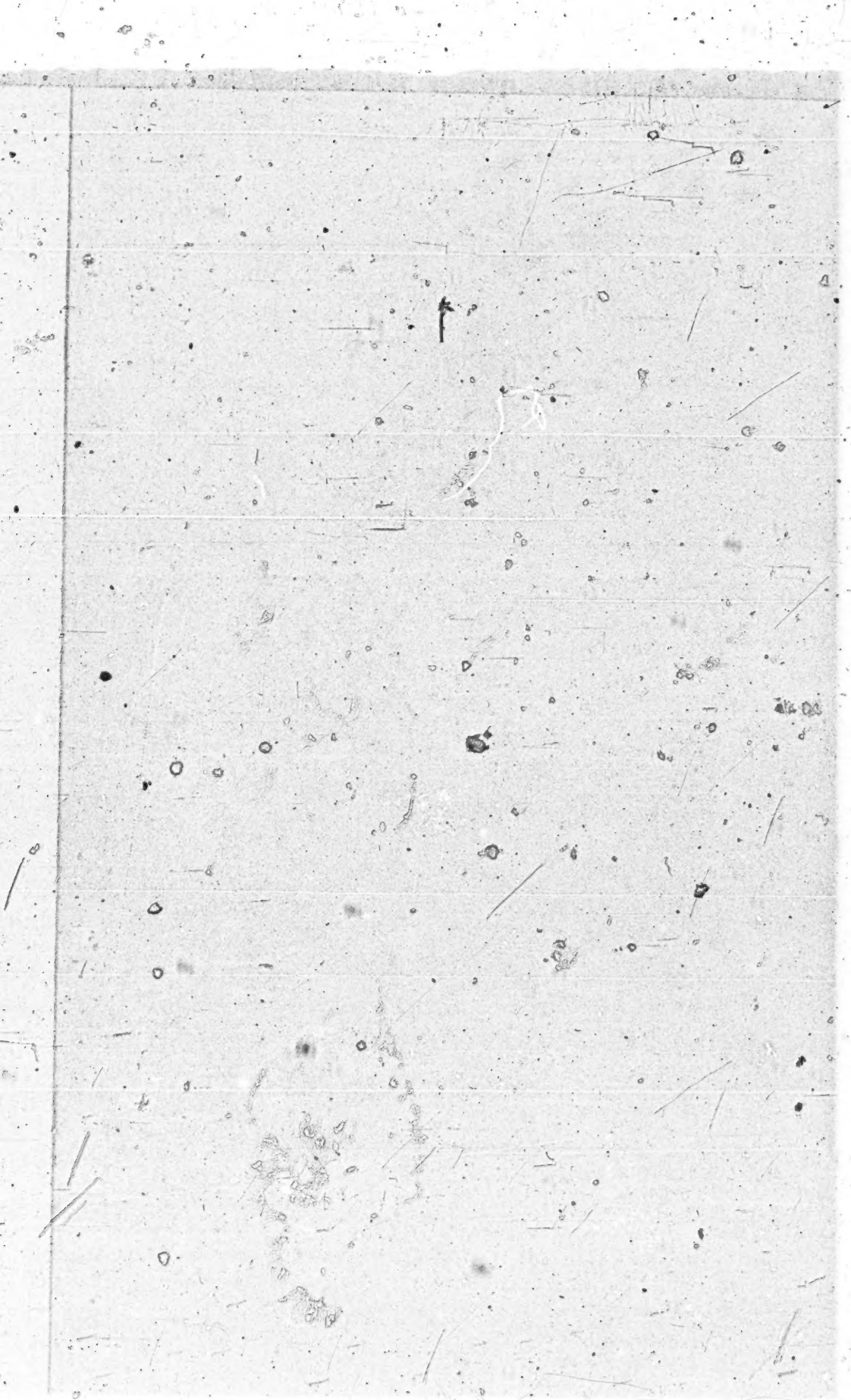
Dear Mr. Solicitor General:

Responding to your kind letter of February 11, received here the 13th, I take due note of your advices, and respectfully suggest that this subject-matter may merit reconsideration.

Referring to final sentence in your penultimate paragraph, it seems to me that no substantial risk exists of the nature there suggested. The intent is that our argument would be as counsel (so specified) for the Government, as well as for the underwriters. This is because their respective interests are in principle precisely the same and not in any wise conflicting; so that whatever helps one interest helps the other.

The financial interest of the underwriters here is about 17 times greater than that of the Government, which disproportion would seem reasonably to justify argument by counsel representing the underwriters. We do not find anything to the contrary in the *Black Diamond* case, 336 U. S. 386, where it appears that private counsel argued notwithstanding that the ship involved was owned by the Government. Neither that case, nor the *Warren* case, 340 U. S. 523, nor the *McMahon* case, 342 U. S. 25, (which three you mention), appears to have involved any feature of disparity comparable to that here presented.

Possibly the situation will be better clarified to you by reference to copy correspondence hereto annexed in letters dated March 11, 1944, November 5, 1946 and December 10,



1946, touching the subject-matter of the insurance in respect of the "both-to-blame" clause, and the undertaking by the underwriters to pay said insurance to the Government, etc., etc. Reference may be had also to the Record herein at pp. 80-82. The status of the whole matter as confirmed by these several documents has not in any wise changed.

The several considerations above mentioned, as well as those in our February 7 letter, including our tender of services in arguing the case, seem to us to conform clearly and decidedly to the coöperation provision in the policy which we mentioned in our February 7 letter.

Our clients here have indicated to us strongly their belief that they have a right to have argument made by their counsel; and that they desire that such argument should be made by us in their interest—which interest they are certain corresponds to that of the Government and in no way conflicts therewith.

The mutual coöperation and collaboration in drafting the brief is much appreciated here. Doubtless considerable additional mutual coöperative effort will be required in preparation of further brief to be filed in reply to appellees' brief when received. Appellees' counsel are known to be astute in matters of this nature, and their brief will surely invite careful study and forceful argument from our side.

We respectfully hope that you may now be able to view this matter in the same sense we have sought to indicate above. We shall appreciate very much having your further advices at such early date as may suit your convenience.

Very sincerely yours,

Roscoe H. Hupper (Sgd.)

Enclosures
RHH:S

Hon. Philip B. Perlman,
Solicitor General,
Department of Justice,
Washington, D. C.

Letterhead of

WAR SHIPPING ADMINISTRATION
45 Broadway
New York 6, New York

MARCH 11, 1944

MESSRS. BURLINGHAM, VEEDER, CLARK
AND HUPPER
27 William Street
New York 5, New York

S.S. NATHANIEL BACON—MS ESSO BELGIUM,
November 24, 1942. File 32724

Gentlemen:

We wish to confirm the writer's telephone conversation with your Mr. Wright in which we advised that Messrs. Kirlin, Campbell have indicated they are willing to recommend settlement of the suits arising out of the NATHANIEL BACON—Esso BELGIUM collision on November 24, 1942 on the following basis: The Esso BELGIUM to pay ⅔rds of all damages and the NATHANIEL BACON ⅓rd; included in the adjustment and setoffs would be cargo's claim in its full amount or 100%. This settlement would leave open for further litigation the validity of the both to blame clause in the BACON's bill of lading. Messrs. Bigham, Englar on behalf of cargo insist on payment to them of 100% of cargo's claim if the both to blame clause is to be litigated.

Insofar as the hull interests of the NATHANIEL BACON are concerned we are willing to recommend adoption of this settlement. However, inasmuch as the Fulton P & I Agency have insured cargo on the BACON, we of course must ask for their views and we hereby do so.

In either of the following events we will recommend settlement on a ⅔-⅓ basis:

1. If the Fulton P. & I. Agency authorizes, approves and agrees to the settlement outlined above without prejudice.

2. If the Fulton P. & I. Agency gives us a commitment, that in the event the collision liability is determined on a both to blame basis and in the event the both to blame clause in the bill of lading is held to be invalid, then the setoff by the Esso Belgium against the Nathaniel Bacon of cargo's claim will be for the account of the Fulton P. & I. Agency.

Settlement of the hull claims between the Esso Belgium and the Nathaniel Bacon is impossible without including cargo.

May we ask you to furnish us with advices from the Fulton P. & I. Agency with respect to the foregoing. As the trial is imminent and as there necessarily will be some delay in obtaining authority if this case is to be settled, we would greatly appreciate your giving this your early attention. We enclose an extra copy of this letter in the event you wish to forward it direct to the Fulton P. & I. Agency.

Very truly yours,

Vincent A. Catoggio, Jr. (sgd.)

Vincent A. Catoggio, Jr.
Assistant District Counsel

VAC: gf

By Hand

Letterhead of

UNITED STATES MARITIME COMMISSION

New York, N. Y. 6

45 Broadway

NOVEMBER 5, 1946.

MESSRS. BURLINGHAM, VEEDER, CLARK & HUPPER
27 William Street
New York 5, New York

S.S. NATHANIEL BACON—SS ESSO BELGIUM, *collision, November 24, 1942. Both to blame collision clause.*

Our File 32724

Gentlemen:

We have a copy of Fulton P. & I. Underwriting Agency letter of October 9, 1946. The statement, that the Agency will make reimbursement under the P. & I. policy, less the deductible of $2,500., in the event you shoud be unsuccessful in recouping on behalf of the NATHANIEL BACON any payment which the NATHANIEL BACON may be required to pay to cargo interests, is satisfactory to us. However it is to be noted that under the present state of the pleadings we are making claim directly against the owners of the cargo, not against cargo underwriters as Fulton's letter states.

We assume Fulton has full authority of its principals to enter into this binding agreement.

May we ask that for record purposes Fulton P. & I. Underwriting Agency, Inc. address a letter directly to us incorporating the agreement. After all you will appreciate

that in this matter we in this office are acting as principals and really should have a direct commitment from Fulton.

You no doubt know that we have many other cases in which the both to blame clause is involved. Accordingly we would appreciate being kept advised of developments herein.

Very truly yours,

VINCENT A. CATOGGIO (Sgd.)
Associate District Counsel.

Vincent A. Catoggio

VAC:gf

Letterhead of

FULTON P & I UNDERWRITING AGENCY, INC.

December 10th, 1946

U. S. MARITIME COMMISSION
39 Broadway
New York 6, N. Y.

Attention of Vincent A. Catoggio, Esq.,
Associate District Counsel

Re: SS NATHANIEL BACON
Esso Belgium, 11/24/42
Both to Blame Collision Clause
Our file No. S 20971

Gentleman:

In answer to your further inquiry the claim of the Esso BELGIUM against the NATHANIEL BACON for 1/3 of its payment to the cargo interests on the NATHANIEL BACON is not recoverable from the Hull Underwriters and therefore is a claim on the P & I Underwriters on the NATHANIEL BACON.

Should you be unsuccessful in recouping on behalf of the NATHANIEL BACON such loss from the cargo interests we will make reimbursement under the P & I policy less the deductible of $2,500.

Yours truly,

FULTON P & I UNDERWRITING AGENCY, INC.
(Signed) Paul R. Jansen
Vice President.

PRJ:bib

Copy to Burlingham, Veeder, Clark & Hupper
Attention of Mr. Ray Rood Allen

[EMBLEM]

Letterhead of

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D. C.

February 26, 1952

ROSCOE H. HUPPER, ESQ.,
BURLINGHAM, VEEDER, CLARK & HUPPER,
27 William Street,
New York 5, New York.

Re: *United States* v. *Atlantic Mutual Ins. Co., et al.*,
U. S. Supreme Court, Oct. Term, 1951, No. 450.

Dear Mr. Hupper:

I have your letter of February 18, 1952 relating to the argument in the above-entitled case. I appreciate the position which you have urged. After full reconsideration of the matter, however, I continue to feel that the general policy of this office as described in my letter to you of February 11, 1952 should be adhered to in this case and that the United States should appear in the Supreme Court through Government counsel.

Mr. Morrisson of my office has arranged with Mr. Haller of your firm for mutual consultation with respect to the preparation of a reply brief.

Sincerely yours,

PHILIP B. PERLMAN

Philip B. Perlman,
Solicitor General.

[TELEGRAM]

RUSH

February 28, 1952
1:15 P.M.

HON. PHILIP B. PERLMAN,
Solicitor General,
Department of Justice,
Washington, D. C.

Referring your letter February 26 responding to my letter 18th concerning United States versus Atlantic Mutual etc. number 450 current Supreme Court Docket my belief remains as stated in my February 7 and 18 letters to effect that overwhelming comparative interest of the underwriters fairly requires in accordance their expressed desire that this case be argued by myself their behalf as their counsel which course wholly consistent with Government interest and protection thereof also consistent with co-operative provisions insurance policy. Endeavored reach you by telephone Wednesday afternoon for discussion soon after receiving your letter and up to one o'clock today am without response to this effort doubtless due your engagements other matters. Have not yet received printed copy Petitioners brief which names me among counsel but have borrowed copy of same from respondents counsel here. Presently believe further discussions between us unlikely produce results desired here therefore have decided with great respect your office and views to apply to Supreme Court by appropriate motion Monday next March 3rd with annex of correspondence for allowance appropriate time for argument by myself behalf underwriter clients with copy motion papers delivered your office in advance sincerely yours

ROSCOE H. HUPPER
27 William Street
New York City